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REPORTS
OF
CASES IN CHANCERY,

ARGUED AND DETERMINED

IN
THE ROLLS COURT

DURING THE TIME OF

THE RIGHT HONORABLE
SIR JOHN ROMILLY, KNIGHT,
MASTER OF THE ROLLS.

BY
CHARLES BEAVAN, ESQ., M.A.,
BARRISTER AT LAW.

VOL. XXV.
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Lord CRANWORTH,
Lord CHELMSFORD, } *Lord Chancellors.*

Sir JOHN ROMILLY, *Master of the Rolls.*

Sir JAMES LEWIS KNIGHT BRUCE,
Sir GEORGE JAMES TURNER, } *Lords Justices.*

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

In re THE CAMERON'S COALBROOK, &c.,
RAILWAY COMPANY.

1857.

May 8.

THE following is the statement of this case as made to the Court, and on which it acted.

Colonel *Cameron* was entitled to an estate in *Wales* under his marriage settlement, which contained a power of leasing. In 1845, the above-named company was projected, for working the mines under the estate, the promoters thereof being Colonel *Cameron*, his son and others. Previous to this, however, Colonel *Cameron* had, in 1841, entered into an agreement with his son to grant him a mining lease, irrespective of the company. Afterwards, on the formation of the company, it was arranged, between the son and the trustees for the company, that the son should sell this agreement of 1841 to the company for 150,000*l.*, that the son should then

A witness is bound to produce a document, in order that it may be given in evidence, notwithstanding he may have a lien on it.

Distinction between the production of documents at the instance of the party who created the lien, and of a stranger, and between production and parting with the possession.

A solicitor, in the presence of his client,

objected to produce a document, on the ground of professional confidence. The Court being of opinion that the document was not privileged as regarded the client himself, ordered its production.

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&C. RAILWAY
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surrender the agreement, and that Colonel *Cameron* should grant a lease to the company: this was done.

The objects of the company failed, and it was ordered to be wound up (a). The Official Manager sought to set aside the lease, and in the course of the inquiry, the solicitor of Colonel *Cameron* was called upon as a witness to produce the agreement and lease. He refused, first because he had a lien on them for his costs; and secondly, on the ground of professional confidence.

The matter was adjourned into Court.

Mr. *R. Palmer* and Mr. *Roxburgh* for the Official Manager, insisted, that the solicitor had no lien, and that, if he had, still as Colonel *Cameron* himself would be bound to produce them, for the purpose of giving them in evidence, so every one claiming under him must stand in the same situation. That it had been repeatedly determined, that a witness must produce documents for the purpose of evidence, notwithstanding any claim he might have upon them; *Brassington v. Brassington* (b); *Thompson v. Moseley* (c); *Hope v. Liddell* (d).

They urged, that if a lien would prevent the right to prove documents in the possession of the opposite party, the greatest injustice would result; for a person, in order to prevent documents being produced against him in Court, would only have to create a lien on them.

Mr. *Elderton* and Mr. *Jeffreys*, *contrà*, for the solicitor.

(a) 18 *Beav.* 339.

(b) 1 *Sim. & St.* 455.

(c) 5 *Car. & P.* 501.

(d) 20 *Beav.* 438, and 7 *DeG., M. & G.* 331.

citor. A solicitor cannot be compelled to produce a document on which he has a lien, until he has been paid his demand ; it is the only security he has for his debt, and by producing it his security is destroyed. It has been held, that "the lien of a solicitor is equivalent to a contract, and he will not be ordered to deliver them up until paid ;" *Richards v. Platel* (a). In *Liddell v. Norton* (b) it was held, that a Defendant cannot be ordered to produce documents pawned before the institution of a suit ; *Warburton v. Edge* (c). Again, in *Postlethwaite v. Blythe* (d) it was observed, that "it is contrary to the whole course of proceedings in this Court, to compel a creditor to part with his security till he has received his money." Secondly, a solicitor is prevented, on the ground of professional confidence, from producing documents which he has received from, and belong to, his client.

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&c. RAILWAY
COMPANY.

The MASTER of the ROLLS.

I think the Official Manager is entitled to the order. The grounds on which the solicitor refuses to produce the agreement for a lease are—first, that of lien, and next, the alleged breach of professional confidence ; these two objections must be kept distinct and separate.

As to the first, the solicitor does not claim against the company any lien on the agreement for a lease, and the case before me must be treated as if the solicitor had been required, by a *subpœna duces tecum*, to produce this agreement on behalf of the company, that is, as an application calling on a witness to appear and give in evidence a certain document in his possession, but on which he claims a lien, as against other persons.

(a) *Craig & Ph.* 79.
(b) *Kay, App.* xi.

(c) 9 *Sim.* 508.
(d) 2 *Swan.* 256.

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~
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persons. The case of *Hope v. Liddell* (a) appears to me to be strongly applicable to the present. A person who has created a lien or those claiming under him cannot compel production of the document on which the lien is claimed. But that is not the case here, and it is very important to bear in mind the distinction which was pointed out by Lord Justice *Turner* in *Hope v. Liddell* (a), namely, "the cases in which the application to the Court has been, not for the production of documents under a *subpœna duces tecum*, but for the delivery up of the documents; and secondly, cases in which the person requiring the production has been the person against whom the solicitor has claimed a lien."

The cases as to parting with documents, and those as to their production at the instance of the person who created the lien, have no application. Nor have those in which a Defendant is called on to produce documents in his power, though not in his possession, as, for instance, where they are in the hands of his solicitor, subject to a lien; those cases relate rather to the right to discovery. Lord *Eldon*, however, in the case suggested, seems to have thought, that a Defendant was bound to produce documents so circumstanced, and for that purpose to pay the money necessary to discharge the lien.

I proceed to examine the second objection as to professional confidence in regard to the agreement for a lease. It is to be observed, that the immunity from production in such cases is not the privilege of the solicitor but of his client, and the solicitor himself cannot waive it without the assent of his client, to whom the documents belong.

So

(a) 20 *Beav.* 438, and 7 *De G., M. & G.* 331.

So far as relates to the lien, my opinion is, that the solicitor has no right to insist on it as regards the company against whom he has no claim; and with respect to professional confidence, the witness is bound to produce it if the client does not object. I therefore think it desirable that I should know what Colonel *Cameron* says to the witness producing it. On that part of the case I should be glad to hear further.

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 & C. RAILWAY
 COMPANY.

Mr. *Roxburgh* then referred to the circumstances of the case, as stated above, and that before the Examiner, Mr. *Archbold* had attended as Counsel for Colonel *Cameron*. This being admitted,—

The MASTER of the ROLLS said, if this be the fact, I think Colonel *Cameron* himself could not resist the production, and they must therefore be produced.

ATHERTON v. LANGFORD.

NATHAN ATHERTON devised a real estate at *Ramsbury* to trustees in fee, upon certain trusts for the children of his son *Joseph* during their father's life; and after *Joseph's* death, upon trust for *Joseph's* children or their issue, as *Joseph* should by deed or will appoint; and in default, to such children equally.

Joseph had eight children, four of whom predeceased him, and their shares in the estate descended on the father (*Joseph*) as their heir at law, subject to his right

real estate to his children equally, and he directed that the estate at *R.*, over which he might have any power of appointment by will, should not be included or affected by his own will, but should go according to the limitation contained in *N.'s* will. Held, that *J.'s* moiety in the *R.* estate passed under the residuary devise in his will, and did not descend to his heir.

Nov. 25.
N. devised an estate at *R.* to such of the children of *J.* as *J.* should by will appoint, and in default to them equally. By the death of four of *J.'s* children, *J.* took half the estate as heir of his deceased children. *J.*, of by his will, devised all his

estate at *R.*, devised by the will of *N.*, over which he might have any power of appointment by will, should not be included or affected by his own will, but should go according to the limitation contained in *N.'s* will. Held, that *J.'s* moiety in the *R.* estate passed under the residuary devise in his will, and did not descend to his heir.

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v.
LANGFORD.

of appointment over the whole property in favour of his surviving children.

Joseph died in 1846, having by his will, made in 1845, devised some hereditaments to the Plaintiff (his eldest son) in fee, and his will proceeded as follows:—

“ I desire that the land and hereditaments situate at *Ramsbury*, devised and settled by the will of my late father *Nathan Atherton*, and over which I may have any power of appointment by will, *shall not be included in or affected by this my will*, but shall go according to the limitations in such will contained. And as to all my real estate, and also as to the personal estate and effects whatsoever and wheresoever, or over which I have any power of disposal, I give, devise and bequeath the same unto” *J. L.* and his heirs, upon trust to convert and invest the produce, and pay the income to his wife, with remainder to his children living at his decease, equally.

Upon *Joseph's* death a question arose, whether the four undivided shares in the freeholds devised by the will of *Nathan Atherton*, and which *Joseph Atherton* acquired as the heir at law of his four deceased children, passed under the residuary devise in his will, or descended upon the Plaintiff as his heir at law, as undisposed of by his said will.

The Plaintiff contended that *Joseph Atherton* died intestate as to the four undivided shares of the devised estates, acquired by him as the heir at law of his four deceased children, and that such four undivided shares devolved upon the Plaintiff as his heir at law. On the other hand, the Defendants contended, that according to the true construction of the will, the four undivided
shares

shares passed under the residuary devise contained in the will of *Joseph Atherton*, and were now subject to the trusts thereof.

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ATHERTON
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LANGFORD.

Mr. *W. Rudall*, for the Plaintiff, argued that the words used were descriptive of the property, and that it appeared, from the terms of the will of *Joseph*, that he intended to exclude from its operation the lands devised by his father, and that therefore the four shares were undisposed of by the will, and descended on the Plaintiff as his heir at law.

Mr. *Giffard*, *contra*, was not called on.

The MASTER of the ROLLS was of opinion that the four shares passed under the will, and that the testator, by this clause, merely intended to say this:—"I have a power of appointing the property amongst my children, and may give the whole to one, but I do not mean to exercise my power of appointment." He said that if *Joseph* had taken as devisee in remainder under the will of *Nathan*, instead of as heir of his children, the result would have been the same, and that his reversion in fee would have passed by the general devise contained in his will.

HARVEY v. CLARK.

1858.
Jan. 14.

THIS suit was instituted to carry the trusts of a will into effect, and the parties were desirous of selling an estate under the "*Leases and Sales of Settled Estates Act*" (19 & 20 Vict. c. 120). A question was raised, whether it could be done in the suit without a petition.

Whether the Court can direct leases and sales under the 19 & 20 Vict. c. 120, in a cause without a petition, *quære*.

Mr. *R. Palmer* and Mr. *Busk* for the Plaintiff.

Mr. *Lloyd*, Mr. *Toller*, Mr. *Southgate* and Mr. *Keene* for the Defendants.

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1858.

The 11th and 16th sections were referred to.

HARVEY
v.
CLARK.

The MASTER of the ROLLS said that the 11th section gave general authority to the Court, and that he would not put the parties to the expense of a petition, but the order must be intituled in the Act.

The MASTER of the ROLLS afterwards referred to the General Orders of the 15th of *November*, 1856 (a), and said that a petition would be the safest course, as these Orders only contemplated proceedings by petition.

(a) *Morgan's Chancery Acts*, 347.

MOORE v. MOORE.

In re MOZLEY.

Jan. 27, 28.

The present liability, in equity, of the sheriff for an escape is the loss actually sustained, and this Court will ascertain the amount of damages.

The principle on which the amount is to be ascertained is, by charging the sheriff with the whole debt, and throwing on him the *onus* of proving that less would have been re-

BY an order on further consideration, *Henry Mozley* was ordered to pay a sum of 1,228*l.* 7*s.* 1*d.* into Court within a limited time.

He made default, and on the 6th of *November*, 1857, an attachment was issued against him, directed to the sheriff of *Derby*, and made returnable on the 26th of *November*. The writ was indorsed for breach of the order for payment of the 1,228*l.* 7*s.* 1*d.* into Court.

The writ was lodged, and *Mozley* was taken on the 9th of *November*, but he was allowed to go at large, on his undertaking to give bail or surrender himself into custody when required.

The

covered if the prisoner had remained in custody or given bail.

A person was taken upon an attachment for nonpayment of money. The sheriff, without taking bail, allowed him to go at large, on his promise to surrender. The sheriff's officer, having called on him to surrender, he shot himself before a recapture, but the officer retained his body. Held, that the sheriff was liable as for an escape.

The sheriff having been called on to return the writ, an officer went to *Mozley's* house on the 2nd of *December* to require him to surrender. *Mozley* was in his bedroom and the door locked; the officer having knocked at the door and asked to speak to him, *Mozley*, without opening the door, shot himself.

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~~~~~

MOORE

v.

MOORE.

*In re*

MOZLEY.

As to what next occurred, the evidence was rather vague and conflicting, but the following is the fair result of it:—The sheriff's officer, on hearing the report of the gun, broke in the panels of the door of the room, when he found that *Mozley* had shot himself, but was then alive. The officer did not then enter the room, but went down stairs to give the alarm, leaving *Walmesley*, a lad of fifteen, at the door. *Walmesley* afterwards entered by the broken panel. He found *Mozley* alive, but he died immediately afterwards, and before the officer's return, and before the door had been opened.

The body was left in the custody of a bailiff until after the coroner's inquest, when he was requested by the under-sheriff to withdraw.

The sheriff afterwards made the following return to the attachment:—"I hereby humbly certify and return, that under and by virtue of the within writ to me directed, I did attach the said *Henry Mozley* to answer the said writ, and that whilst the said *Henry Mozley* was in my custody, under and by virtue of such writ, he committed suicide, wherefore I cannot have him before the Queen in her Court of Chancery, as by the within writ I am commanded."

The Court was now moved, on behalf of the Plaintiffs, that the sheriff might be ordered to pay into the bank the sum of 1,228*l.* 7*s.* 1*d.*, and pay the Plaintiffs the costs of the contempt occasioned by the attachment.

Mr.

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In re  
MOZLEY.

Mr. *Lloyd* and Mr. *Martindale*, in support of the motion. The sheriff, by allowing *Mozley* to go at large without taking bail, has acted at his own peril; for after once taking a person under an attachment, the sheriff is bound to keep him safely so as to be forthcoming in Court; *Daniel's Prac.* (a). The sheriff, by his default, has become answerable for the sum indorsed on the writ, and for the costs. In *Levett v. Letteney* (b), the Defendant was taken on an attachment for non-payment of 1,719*l.*, and was allowed to go at large, the Court ordered the sheriffs of *London* to pay that sum. The same course was followed in *Solly v. Greathead* (c), and *Dewes v. Beresford* (d). It is quite unnecessary to bring an action at law to determine the amount for what the sheriff is liable, for these authorities shew, that the measure of damages is the amount to be paid with costs, but, if necessary, this Court will assess them; *Bricknell v. Stamford* (e); *Frowd v. Lawrence* (f); *May v. Hook* (g).

Mr. *R. Palmer*, Mr. *Speed* and Mr. *W. Field*, for the sheriff, argued, first, on the facts, that the Plaintiffs had acquiesced in *Mozley's* remaining at large. Secondly, that *Mozley* had been recaptured on the 2nd of *December*, he being then under the restraint of a sheriff's officer, which, of itself, is an arrest without proceeding to actual contact; *Grainger v. Hill* (h); even an acquiescence would be sufficient, *Russen v. Lucas* (i); that *Mozley* had died in custody, and therefore no liability attached on the sheriff; *Lewis v. Morland* (k); *Collard v. Hare* (l). Thirdly, that as *Mozley* was wholly

(a) Vol. i. p. 324, 3rd ed.

(b) *Beames on Costs*, App. No. 5.(c) *Ibid.* No. 6, and 11 *Vcs.* 170.(d) 5 *Sim.* 531.(e) 1 *Beav.* 368.(f) 1 *Jac. & W.* 655.(g) 2 *Dickens*, 619.(h) 4 *Bing.* (N. C.) 212.(i) 1 *Car. & P.* 153, and 1 *Ry. & M.* 26.(k) 2 *Barn. & Ald.* 56.(l) 5 *Sim.* 10.

wholly insolvent at the time, the damage sustained was nominal, and that the sheriff was only liable for the actual loss, and not for the amount indorsed on the writ.

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MOORE  
v.  
MOORE.

In re  
MOZLEY.

They argued, that the cases which had been cited from *Dickens* had been decided by analogy to the rules then existing at law, but that now the law had been altered. The statutes as to escape being the 13 *Edw.* 1, c. 11, which made the sheriff liable, and the 1 *Rich.* 2, c. 12, which gave to the Plaintiff an action of debt against the *warden*, under which the *sheriff* had been held liable for the whole debt; *Hawkins v. O'Conner* (a); *Bonafous v. Walker* (b); a jury could not, formerly, give less than the sum indorsed on the writ; and the cases in *Beames* had been decided in analogy to the cases at law. But that now the law had been altered by express statute.

The 5. & 6 *Vict.* c. 98, s. 31, enacted, "that if any debtor in execution shall escape out of legal custody, after the passing of this act, the sheriff, bailiff or other person having the custody of such debtor shall be liable only to an action upon the case *for damages sustained* by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape;" *Williams v. Mostyn* (c); *Clifton v. Hooper* (d). That at law, therefore, the measure of the damages was the value of the custody at the moment of the escape; *Arden v. Goodacre* (e); and the same rule must now be adopted in equity. Consequently the Plaintiffs ought to be at liberty to bring an action at law to ascertain the damage. They also cited *Smith's Prac.* (f); *Danby*

v.

(a) 2 *W. Black.* 1048.  
(b) 2 *Term Rep.* 126.  
(c) 4 *Mcc. & W.* 145.

(d) 6 *Q. B. Rep.* 468.  
(e) 11 *C. B. Rep.* 371.  
(f) Page 1029.



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Mr. *Lloyd* in reply. The damage done to a Plaintiff in Equity cannot be the limit of his rights against a sheriff for an escape; for, in a creditors' suit, the Plaintiff's individual loss may be trifling, and payment of that sum would not indemnify the other creditors for the damage occasioned to them by the loss of large assets ordered to be paid into Court. The statute of 5 & 6 *Vict.* c. 98, applies only to common law proceedings, for the same section (31) directs the "Judges of the Courts of Common Law at *Westminster*" to settle the amount of fees in lieu of poundage payable to sheriffs. Like the 3 & 4 *Will.* 4, c. 42, ss. 26, 27, as to evidence, this statute has no application to Courts of Equity; *Oliver v. Latham* (f).

*The MASTER of the ROLLS*:—I will read the affidavits, but at present my impression is in favour of the Plaintiffs, and that there has been an escape.

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*The MASTER of the ROLLS.*

Jan. 28. Upon reading the affidavits I have come to a conclusion adverse to the sheriff. In the first place, I think it quite clear that Mr. *Mozley* was taken on the 9th *November*, and allowed to go at large on that day without bail, and that he never was recaptured. This amounts to what in law is an escape. No licence was given not to recapture him, or not to execute the writ; but even if

(a) 1 *Eq. Ca. Ab.* 351.

(b) 3 *Smale & G.* 168.

(c) *Page* 129, 2nd ed.

(d) 5 *Term Rep.* 37.

(e) *Page* 487, 8th ed.

(f) 1 *Phill.* 403.

if it had been, still, as the Plaintiff's solicitor was kept in ignorance by the under-sheriff, by being informed that *Mozley* was out on bail, such licence, if given, would have amounted to nothing.

It is not attempted to be disputed, that, after the capture on the 9th *November*, Mr. *Mozley* having been allowed to go at large without bail, this was a complete escape at law. Then the only question is, was he retaken? It was argued that the transaction which occurred on the 2nd of *December* amounted to a recapture; but it is obvious that it was nothing of the sort. Mr. *Simpson* had allowed Mr. *Mozley* to go at large, on his promise that he would surrender himself when required. If he had so surrendered and had died in custody, undoubtedly the Plaintiffs could not have complained; but so far from that being the case, it is clear that *Mozley* has as completely broken his promise to surrender to the writ and to put himself in custody whenever required by Mr. *Simpson*, as if he had absconded at night and run out of the country.

It is obvious that the act he committed was for the purpose of avoiding capture, and that there never was a recapture. The under-sheriff trusted to *Mozley's* word that he would surrender, and he continued promising that he would keep his word and would surrender to the last moment, when he took the most effectual means that could possibly be taken to prevent his being taken into custody. I am satisfied, upon the evidence, that he was never in custody, but that he was dead before the sheriff's officer approached him. A capture requires either a touch or something approaching to it, or else a statement to the prisoner that he must consider himself in custody, and the prisoner obeying and following the officer, which would amount to the same thing.

I am

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I am of opinion, therefore, upon the facts of the case, that the sheriff is liable, and that the real question is this:—In what manner and to what extent is the sheriff liable?

With reference to the manner in which he is liable, I have no doubt that an action would lie upon the case for consequential damages sustained by reason of the escape of the prisoner after being taken, but I do not think it is necessary for me to resort to that course, because I am of opinion that I have jurisdiction in the matter (a). I think the cases of *Levett v. Letteney* and *Solly v. Greathead* shew that the Court has jurisdiction in such cases, and it would be a very inconvenient course to send the question relating to the measure and amount of damage which has been sustained to be tried by an action at law, when it could be as easily determined here. Therefore I do not think it a convenient course to send the matter to law.

With respect to the amount of liability, I am of opinion that the extent of the liability is the damage actually sustained by reason of the absence of the prisoner from custody. I think that the reason why in *Levett v. Letteney* and *Solly v. Greathead* the total amount of the debt was given was this:—that upon the statutes then in force and the decisions on them, the total amount of the debt would have been recovered at law, and that it was not possible to plead, by way of defence, that less than the total amount would actually have been recovered from the prisoner. But the 5th and 6th of the Queen (which, although it does not apply to the Court of Chancery, yet must govern the rules and practice of this Court on the same matter) enacts, “that if any debtor in execution shall escape out of legal custody

(a) See 21 & 22 *Vict.* c. 27, s. 6.

custody after the passing of this act (which is the case here), the sheriff, bailiff or other person having the custody of such debtor shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape." I do not think that that clause meant to interfere with the jurisdiction of the Court of Chancery, but I look to ascertain the manner in which the Legislature considered it fair and proper that the sheriff should be answerable to any one for allowing a prisoner to escape. The extent and measure of his liability is to be the loss sustained by reason of the prisoner having been let out of custody. It is quite clear that this is the reasonable view of the case: viz., to remunerate the Plaintiff by placing him in exactly the same situation as he would have been in if the prisoner had not been allowed to escape: that is, to give him the utmost he could have got. Now the debt and the costs of contempt would clearly be all that could be got under any circumstances. Mr. *Lloyd* felt the force of this, but he argued, with a good deal of force, upon the inconvenience and difficulty of ascertaining what would have been the real value of the custody, that the mere state of the property of the man might not be the measure, but that the commiseration of his friends and the interference of relations and the like might have afforded means, from which the Plaintiff might have derived advantage which could not be now ascertained. I give no opinion upon that, but the actual loss being the measure pointed out by the Legislature, and this being equally the reason and equity of the thing, I think the Court must adopt the same course, and not be deterred by any difficulty which it may meet with in carrying it into effect.

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I express no conclusive opinion as to the manner in which the inquiry ought to be carried into effect, but when I shall have the case before me in Chambers, upon my present view of the case, the course which I shall probably adopt will be to this effect:—considering the escape proved, and that the sheriff was not justified in allowing the prisoner to escape, I shall hold, *prima facie*, that the sheriff is liable for the whole of the loss sustained, he having occasioned that loss by the misconduct of his servant, for which he is liable. Then the burthen will lie on him to shew that, at and after the time that Mr. *Mozley* was taken, it would not have been possible for him to have discharged this debt by any reasonable means; in answer to which the Plaintiff should be at liberty to shew what sources of payment were open.

The order will be to refer it to Chambers to ascertain what loss has been sustained by the Plaintiffs by reason of *Henry Mozley*, deceased, having been permitted to escape from the custody of the sheriff upon the 9th of *November*, 1857, and having been permitted to remain out of such custody till his decease upon the 2nd of *December*, 1857, and then I shall be able to deal with the matter at Chambers.

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## IBBETSON v. GROTE.

Jan. 19.

**A** TESTATOR gave a sum of 30,000*l.* to trustees, for his nephew, *Christian Paul Meyer*, for life, and after his decease, upon trust for *Christian Paul Meyer's* children who should be living at the time of his decease, equally. The share of any of the children dying in their father's lifetime was given over to their issue living at his death. The will also contained a proviso that, in case any one or more of the children of *Christian Paul Meyer* should die in his lifetime, without leaving any lawful issue who should be living at his decease, then the share to which every such child (being a daughter) would have become entitled, should, if such child should leave a husband who should be living at his nephew's decease, go to and be in trust for such her husband, and his executors, administrators and assigns, absolutely.

A husband covenanted to settle the share of his wife and of himself "in her right" in the stocks comprised in her great uncle's will. Under the will, the fund was limited to the husband, in case of his surviving his wife and her father, and of there being no issue. Held, that the husband's interest was not comprised in his covenant.

In 1841, *Eliza M. B. Meyer*, one of the daughters of *Christian Paul Meyer* (while an infant), married *Henry C. Ibbetson*, and by the settlement made on that occasion, Mr. *Ibbetson* covenanted with trustees, that he would, forthwith, well and effectually assign unto the trustees all and every the share or shares of *Eliza M. B. Meyer*, or of himself *in her right*, of and in (amongst others) all and singular the stocks, &c. comprised in the above will, and to which *Eliza M. B. Meyer* was entitled, or to which she or *Henry C. Ibbetson*, *in her right*, might, during the intended coverture, become entitled, under or by virtue of the trusts of the will. The property was to be held upon the usual

1858. trusts for Mr. and Mrs. *Ibbetson* successively for life, and afterwards for their children, and in default, *for her next of kin*, as if she had died intestate and without having been married.

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Mr. *Ibbetson* also covenanted to convey, upon like trusts, any real or personal estate exceeding 100*l.* which, at any time during the intended coverture, should become vested in *Eliza M. B. Meyer* or in him *in her right*.

By an indenture dated the 15th of *December*, 1841, Mr. *Ibbetson* assigned to the trustees a sum of Bank Annuities, "and all other the personal estate and effects to which the said *Eliza M. B. Ibbetson* or he, *Henry C. Ibbetson*, *in her right*, was entitled, for any interest whatsoever, at law or in equity, and whether present or future, vested or contingent, to hold upon the trusts of the settlement.

Mrs. *Ibbetson* attained twenty-one, and died in 1843, without having had any issue.

*Christian Paul Meyer* died in 1857, and thereupon Mr. *Ibbetson*, who survived him, claimed to be absolutely entitled to the share in the fund which *Eliza*, his deceased wife, would have become entitled to, in case she had survived her father. The Defendants contended that, subject to Mr. *Ibbetson's* life estate, the share in question belonged to his wife's next of kin, to the exclusion of her husband.

A special case was framed to determine the question.

Mr. *Follett* and Mr. *Giffard* for the Plaintiff. This property was not comprised in the settlement, for it never belonged to the wife; her interest was contingent  
and

and failed by her death in her father's life; nor did it vest in the husband "in her right," or during the coverture, but in his own and afterwards. If the bequest had been in this form:—"I give to the husband of *Eliza* 1,000*l.*," could it be said that he took in right of his wife? The covenant was intended to include merely what he might become entitled to as husband by operation of law, and not what was acquired by direct gift to him. They cited *Ex parte Blake* (a).

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Mr. *Lloyd* and Mr. *Grenside* for the Defendants. The clear intention of the parties was, that everything taken under the will should be settled, and unless this interest of the husband was included, he settled nothing whatever. This intention, which is "the truth and honour" of the settlement, must prevail; *Woodcock v. The Duke of Dorset* (b). Again, a grant and covenant is to be construed most strongly against the grantor and covenantor, and therefore, if the case be doubtful, the instrument must be taken most strongly against Mr. *Ibbetson*.

The Plaintiff does not take as *persona designata* under the will, for any other person whom *Eliza M. B. Meyer* might have married would have been equally entitled. He takes by virtue of his character of her husband, and in his marital right. He acquired this property through his wife, by her assent to the marriage, and therefore in her right; it consequently comes within the grant and covenant, and ought to be settled.

*The MASTER of the ROLLS.*

I entertain no doubt as to the construction of these  
 instruments.

(a) 16 *Beav.* 463.

(b) 3 *Bro. C. C.* 569.



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instruments. It is very true that they must be construed most strongly against the grantor ; but it is the first duty of the Court to determine the effect of the words of the document.

If Mrs. *Ibbetson* had survived her father, then her husband, in her right, might have taken an interest in this fund ; but Mr. *Ibbetson* took this not as husband, for, at her death, he was no longer her husband, he took it by surviving her and her father. When a husband is spoken of as taking in his wife's right, it refers to something which the wife, but for the marriage, would have taken ; but here she never took any interest at all in the fund. The words are "in her right," and not "by virtue of his having been her husband."

If it was the intention of the parties to the settlement to settle everything taken under the will, that intention does not appear on the face of the instrument, there is no recital of that intention, and it has not been carried into effect. I entertain no doubt that these instruments do not apply to the share of 30,000*l.*, in which the wife, in consequence of having pre-deceased her father, took no interest, and which the husband is entitled to, under the limitations in the will, by reason of his having survived both his wife and her father, and of there being no issue of the marriage.

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## SHEPHERD v. CHURCHILL.

## IN THE MATTER OF THE TRUSTEE ACTS.

Dec. 4.

**B**Y the decree, it was ordered, that a partition should be made of the estate and hereditaments between the several parties entitled thereto, according to their respective rights and interests therein; and a commission was ordered to issue for that purpose; and it was ordered that the Commissioners should make a division of the said estates and hereditaments with the appurtenances, in equal twelfth parts or shares, and a sub-division of one of such twelfth parts or shares into four equal parts or shares, and a sub-division of another of such twelfth parts into sixteen equal parts, and make the same by metes and bounds, where they should see occasion. And it was ordered, that the Commissioners should allot to the Plaintiff two equal twelfth parts of the said estate and hereditaments, and one-fourth part of another twelfth part thereof, and one-sixteenth of another twelfth part thereof, and to the Defendants, &c., &c. [*stating the allotments in detail*].

Upon a partition, the shares of the parties were very minute and complicated. The Court, to save expense, and instead of directing a conveyance of the several shares, declared each of the parties trustees, as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee, under the Trustee Acts, with directions to convey to the several parties their allotted shares.

The Commissioners having accordingly made the partition, the Plaintiff presented a petition, intituled in the cause and in the Trustee Acts, stating, that by reason of the number of parties required for the due conveyance of the several hereditaments in severalty, the intricacy of their respective interests, and the settlement of some of the undivided shares of the estate, it would be desirable, that in lieu of any such conveyance, an order should be made by the Court, under the Trustee Act, 1850 and the Extension Act, vesting the several hereditaments in several parties to whom the same had been so respectively allotted in severalty.

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The petition prayed, that the several hereditaments so allotted and divided might, under or by virtue of the Trustee Acts, vest, or be and become vested in, the several parties to whom the same had, by the return of the said Commissioners, been so respectively allotted in severalty.

Mr. *R. Palmer* and Mr. *Boyle*, in support of the petition, referred to and commented on the 13 & 14 *Vict.* c. 60, ss. 30, 32, 34, 43, and the 15 & 16 *Vict.* c. 55, s. 9.

Mr. *Bird* supported the petition, and referred to a MS. case of *Daniel v. Jerrard*, and to *Bowra v. Wright (a)*, where, upon a partition, infants had been declared to be trustees of such parts of the property as were allotted in severalty to the other parties; and see *Cole v. Sewell (b)*.

Mr. *Lloyd*, Mr. *Beales*, Mr. *Baggallay*, Mr. *Hobhouse*, Mr. *Follett*, Mr. *S. Vincent* and Mr. *Schwyn* for other parties.

*The MASTER of the ROLLS.*

I have no objection to do it if I have power; it is very important for the parties, and I am disposed to think I can do it. I have, in other cases, appointed a new trustee where his only duty was to convey, and here the whole might be vested in one trustee.

Some discussion afterwards took place as to the best mode of effecting the object, and ultimately

*The MASTER of the ROLLS* sanctioned an order in the following form:—

Declare, that (except only as regards their own respective allotments) the several persons parties to this suit having any undivided interest

(a) 4 *De G. & Sm.* 265.

(b) 17 *Sim.* 40.

interest in the leasehold estate, which, under the decree, has been allotted in severalty by the Commissioners, are respectively trustees, within the meaning of the Trustee Acts, as respects the premises in their undivided state, for the several parties to whom the same have respectively so been allotted in severalty.

And it being expedient to appoint one new trustee in their place, for the purpose of assigning the said allotted premises in severalty to the respective parties entitled to the same, and it being inexpedient or impracticable to appoint such new trustee without the assistance of this Court, let *A. A. G.* be appointed the sole trustee of the said leasehold hereditaments, in the place of the several parties so hereby declared to be trustees thereof, and let the said hereditaments so held in trust vest in him for all the residue of the term.

Let *A. A. G.* assign the said divided premises to the several parties to whom the same have so respectively been allotted in severalty as follows:—

[Specifying the particulars.]

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1858.

Feb. 10.

THE testator devised his freehold and copyhold property to two trustees, upon trust for his wife *Frances Liman* for life, with remainder to his son *William Liman* for life, and after the death of the survivor, in trust to sell. The testator directed the produce to be paid to and divided as follows:—"Between all such of my grandchildren who shall be living at the time of the decease of the survivor of them the said *Frances Liman* and *William Liman* in equal shares and proportions, (except my two grandsons *Edward Liman* and *John King* the younger, neither of whom shall receive anything under this my will); and I direct that the shares which would otherwise have been payable to the said *Edward Liman* and *John King* the younger shall be paid to my granddaughter *Susannah Grainge* for her own sole and separate use, without being subject to the

Gift of a share "in addition," held, under the circumstances, not liable to the same contingency as the original share.

A testator devised an estate to *A.* and *B.* successively for life, and, after their deaths, to sell and divide the produce between his grandchildren who should be living at the decease of the survivor of *A.* and *B.*, except his grandsons *Edward* and *John*, neither

debts,

of whom was to receive anything; and he directed that the shares which would be otherwise payable to them should be paid to his granddaughter *Susannah*, "in addition to her own share." *Edward* and *John* survived the tenants for life, but *Susannah* predeceased them. Held, that the two shares passed to the representatives of *Susannah*.

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debts, control or engagements of her present or any future husband, and *in addition* to her own share which she would receive as one of my grandchildren."

The testator died in 1843, and his widow and son were now both dead.

*Edward Liman* and *John King* (the excluded grandchildren) survived both the widow and son; but *Susannah Grainge* died in the lifetime of the survivor of them. There were eleven other grandchildren who survived the tenants for life.

The question was, whether *Susannah Grainge* took any share in the produce of the estate.

Mr. *Moxon* for the Plaintiff. *Susannah Grainge* could only take her original share in the event of her being "living at the time of the decease of the survivor of them *Frances Liman* and *William Liman*." The shares of *Edward Liman* and *John King* are given expressly "in addition to her own share;" and by the rule of Court, additional and substituted legacies are payable out of the same fund and are subject to the same conditions and incidents as the original legacies; *Leacroft v. Maynard* (a); *Crowder v. Clowes* (b); *Cooper v. Day* (c), and see *Day v. Croft* (d). *Susannah* not having survived the tenants for life, her representative is entitled to no portion of the fund.

Mr. *R. Palmer*, *contrà*, was not heard.

Mr. *Poulter*, for the trustees.

Mr.

(a) 3 Bro. C. C. 233.  
(b) 2 Ves. jun. 449.

(c) 3 Mer. 154.  
(d) 4 Beav. 561.

Mr. *Webb*, for other Defendants.

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*The MASTER of the ROLLS.*


I cannot concur in the argument. No doubt a substituted and additional legacy is usually given on the same terms as the original one. But this must be taken with this qualification:—that it is consistent with the terms of the gift and the scope of the rest of the will. Supposing this testator had said in his will, “I give *Susannah*, in addition, a legacy of 100*l.*,” could it be held that she would not take unless she survived the tenants for life? It would be an absolute pecuniary gift to her. So here, there is a distinct direction that the shares which would have belonged to the two grandsons, if they survived the tenants for life, should not be paid to them, but to *Susannah*. When this occurred she became entitled to these shares, and the fact of their being given “in addition” does not deprive her of a distinct and separate legacy, the terms of the gift not requiring that she should survive the tenants for life in order to become entitled.

PHILLIPS *v.* BEAL.

Feb. 10.

THE testator by his will, dated in 1846, expressed himself as follows:—“I give, devise and bequeath all my household goods, furniture, plate, linen, china, glass, together with all bills, bonds, notes of hand, mortgages and everything that I may die possessed of, unto my dear wife *Mary Anne Hill* for her life. And I hereby will and direct, that the bequest to my said wife hereinbefore made shall be subject and liable, during her whole of his effects which might be then remaining unto and to the use of” the Plaintiff. Held, that the real estate passed.

A testator “gave, devised and bequeathed” his household goods, &c., “and every thing he should die possessed of,” to *A.* for life, and after her death, he “gave, devised and bequeathed the

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her lifetime," to the maintenance, education and support and providing of *Elizabeth Offrida Hill Skinner*, for whom he then made a provision, and proceeded:—  
 "And from and immediately after the death of my said dear wife I then give, devise and bequeath the whole of my effects that may be then remaining unto and to the use of the said *Elizabeth Offrida Hill Skinner* for her own absolute use, benefit and disposal, separate and apart from any husband or husbands she may hereafter happen to marry. I appoint my said wife *Mary Anne Hill* sole executrix of this my will."

The testator died in 1851, seised of a real estate which was subject to a mortgage.

This bill was filed by *Elizabeth Offrida Hill Skinner* (now Mrs. *Phillips*), and the question was, whether the testator's real estate passed under the terms of this will.

Mr. *Follett* and Mr. *C. Hall*, for the Plaintiff, argued that the equity of redemption of the freehold passed by the will. They commented on the words "devise" and "I may die possessed of," and relied on the cases of *Warner v. Warner* (a); *Thomas v. Phelps* (b).

They observed that this will was governed by the last Wills Act.

Mr. *Bardswell* for the Plaintiff's husband.

Mr. *Shapter* and Mr. *Marrett*, in the same interest, referred to *Davenport v. Coltman* (c); *Re The Greenwich Hospital Improvement Act* (d).

Mr.

(a) 15 *Jurist*, 141.  
 (b) 4 *Russ.* 348.

(c) 12 *Sim.* 605.  
 (d) 20 *Beav.* 458.

Mr. *Fooks* for the heir at law. The real estate does not pass by this will. The whole of the expressions "household goods, &c., &c.," have reference to personalty alone, and in the ultimate gift, comprising the whole, the testator uses the expression "effects," which will not of itself include land; 1 *Jarman on Wills* (a). There is an absence of words of inheritance which might control the effect of other expressions, as was observed in *Coard v. Holderness* (b). There is nothing here pointing to realty but the word "devise," which might equally apply to personalty, and the words "possessed of" is technically applicable to personal estate alone.

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In *Warner v. Warner* (c) the personalty had already been given, and the codicil was only necessary to pass the real estate. In *Thomas v. Phelps* (d) the testator used the word "estate" at the commencement of his will.

He also referred to *Molyneux v. Rowe* (e).

*The MASTER of the ROLLS* (without hearing a reply).

As to the first question, whether the real estate passes, I have no doubt that there is sufficient for that purpose. The word "devise" is properly applicable to a disposition of real estate, which is *primâ facie* its meaning. If a testator says, "I give, devise and bequeath," the words "give and bequeath" apply to the personal estate, and "devise" to the real estate. Here he "devises" "everything he may die possessed of," which is sufficient to cover real estate.

The

(a) 2nd edit., p. 620.  
(b) 20 *Beav.* 147.  
(c) 15 *Jurist*, 141.

(d) 4 *Russ.* 348.  
(e) 25 *L. J., Ch.* 570.



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The subsequent clause is distinct. After his wife's death, he "devises" "the whole of his effects" "unto and to the use of" the Plaintiff. These words are sufficient to pass the real estate, and by reference back to the previous gift to his wife for life, it shews, if there be any doubt about it, that, in that clause, he intended to dispose of his real estate.

1857.

Nov. 24.

The governing body of a grammar school founded by Edward VI. was empowered, with the advice of the Bishop of the diocese, to make statutes and ordinances. Held, that this was a Church of England school, and that the trustees must be of that persuasion; but the Court on directing a scheme refused to give any special directions as to religious instruction, further than that it was to be in accordance with the statutes and ordinances made, from time to time, by the trustees and the Bishop.

*In re* THE STAFFORD CHARITIES.

**K**ING EDWARD VI., by letters patent, made in the fourth year of his reign, "on the humble petition of the inhabitants and burgesses of the town of *Stafford* to him, for a grammar school there to be erected and established for the teaching and instruction of boys and youth," created a grammar school in *Stafford*, "for the education, instruction and teaching of boys and youth in grammar, to endure for all future times, and that school, of one master or teacher and one under master or under teacher, for ever to continue."

The King thereby incorporated the burgesses, and for the maintenance of the school, granted to them certain hereditaments, which formerly belonged and appertained to the free chapel or hospital of *St. John* the Baptist, near *Stafford*, then dissolved, and to the late free chapel of *St. Leonard*, near *Stafford*, then dissolved.

His Majesty also thereby granted to them, as follows:—"full power and authority of naming and appointing

*The Attorney-General v. The Sherborne Grammar School* (18 Beav. 256) followed.

pointing the master and under master of the school, so often as the same school shall be void of a master or of an under master; and that the same burgesses, *with the advice of the bishop of that diocese* for the time being, from time to time, shall make and may and shall be able to make *statutes and ordinances*, in writing, concerning and touching the ordering, governance and direction of the master and of the under master, and of the scholars of the school for the time being, and the stipends and salaries of the same master and under master, and other things touching and concerning the same school, and the ordering, governance, preservation and disposition of the rents and revenues appointed and to be appointed for the support of the same school; which same statutes and ordinances, so to be made, we will, grant and by these presents command, shall be inviolably observed from time to time for ever.

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He granted them power to hold in mortmain, so, nevertheless, that the aforesaid burgesses of the town of *Stafford*, and their successors, shall hereafter for ever totally and entirely convert and confirm the profits, issues, rents and revenues of the aforesaid messuages, lands, tenements, and of all and singular other the premises and every parcel thereof given and granted as aforesaid to the burgesses of *Stafford*, and their successors, *to the continuance, support and maintenance of the grammar school* in the same town, in form aforesaid, to be erected and established *for the teaching and instruction of boys and youth resorting thither*.

On the 16th of *April*, 1857, upon the petition of the mayor and some inhabitants of *Stafford*, it was referred to chambers to appoint new trustees and to settle a scheme for the government of the school.

It

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It was then proposed, on the one hand, that there should be seventeen trustees, all of whom should be in communion with the Church of *England*; on the other hand, the Attorney-General proposed, that of the twelve new trustees now to be appointed, half should be Dissenters and the other half members of the Church of *England*.

Again, it was proposed, on the one hand, that the religious instruction should be confined altogether to the instruction in the doctrines of the Church of *England*. The proposition of the Attorney-General, on the other hand, was, that religious instruction, according to the doctrine and discipline of the Church of *England*, should be given only to those boys whose parents should not object thereto. The consideration of those two points was adjourned into Court for argument.

The Attorney-General (Sir *R. Bethell*) and Mr. *Wickens*, in support of the proposition for the admission of Dissenters, stated, that memorials, signed by a number of respectable inhabitants, had been presented to the Attorney-General, desiring the introduction of some dissenting trustees into the number to be now appointed by the Court, and representing, that it was desirable for the town and for the benefit of the charity itself, as giving confidence in the administration of it, and as rendering the school more likely to be universally resorted to by the children of the inhabitants of the town and neighbourhood, that there should be this admixture of Dissenters in the governing and administering body.

They argued as follows :—It will be contended that this is an exclusively Church of *England* charity, and that it is manifested by the circumstance, that the trustees

tees are to make rules and ordinances by the advice of the Bishop of the diocese ; but that hardly carries matters further than we should be prepared to admit, having regard to the religious feeling of the time, the uniformity that then prevailed, and the entire absence of any toleration of any other form of worship. It is apparent to everybody, that at the time of the foundation of this school, there could be no other form of religious instruction given, than that which was in conformity with the doctrines of the Church of *England*.

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Then does not the main and paramount object of the charity, namely, the instruction of all the youth of *Stafford*, afford a leading rule in the administration, and open the door to the children of all religious christian persuasions, now that you are no longer compelled to recognize one persuasion exclusively ? That would seem to be the necessary conclusion to be drawn from the Act of Toleration. If, by a law, persons born within a certain county were alone permitted to reside in a particular town, and if, whilst that law was in operation, a school were established for the benefit of the children of the inhabitants of that town, it would then be a restricted school for the benefit of the children of persons born in that particular county. But if that law were afterwards abrogated, and all persons, where-soever born, were permitted thenceforward to dwell in that town, the charity would remain, but after the abrogation of that law, the school would not be confined to the children of persons born in that particular county. That restriction being done away with and that limitation effaced, then, from and after the abrogation of the law, the trust and charity would enure to the benefit of all the children within the town indiscriminately, and whether their parents were born within the originally favoured county or not. Apply that illustration, by
way

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way of analogy to this case. When all *England* was bound to adopt the principles and doctrines of the Church of *England* alone, when dissent was not tolerated, when it was heresy and heresy was a crime, a charity would not be founded for those that were criminals, and the charity was a Church of *England* charity. But that law being abrogated, dissent is permitted, Dissenters are placed upon the same footing, and if the charity remain, it is a charity for the children of all the inhabitants of that town.

It is impossible to say that the charity does not acquire, by the operation of the subsequent enacting law, a larger field and greater comprehensiveness than it would have had if the old law had continued in operation. It is just the same thing as if the limits of the town had been defined at the time of the creation of the charity, for then if the limits of the town were afterwards extended by Act of Parliament, the class entitled to the benefit of the charity would, at the same time, be enlarged.

The MASTER of the ROLLS.—Your argument would have great weight if you could shew any Statute which said that Independents and Presbyterians, for instance, were to be considered members of the Church of *England*, and participate in the benefits intended for them.

The Attorney-General.—But here nothing is said, in the instrument of foundation, as to the charity being exclusively for members of the Church of *England*; if it had, we admit you could not extend it; but if the school is for the inhabitants of the town, and you seek to limit it to members of the Church of *England*, because at that particular time, the inhabitants spoken of must have been members of it by the operation of a law extrinsic to the charter, then, inasmuch as the restriction which
 operated

operated upon the charter extrinsically no longer exists, the charter is no longer subject to the effect of that limitation.

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In the *Attorney-General v. The Sherborne Grammar School (a)*, the Court did not consider itself at liberty to hold the matter to be subject to the jurisdiction of the Court, for these reasons:—there had been published, from time to time, a different series of ordinances for a period of about 200 years, which had proceeded on a construction, limiting the character of the religious instruction to be given in the school. A large visitatorial power was vested in the Lord Chancellor, and the ordinances emanated from an internal authority within the school, which was liable to be controlled by visitatorial power; it accordingly appeared to this Court that the proper mode to be adopted in that case was, not to adjudicate upon the matter until the visitor's attention had been directed to the subject, and to see what description of ordinances the visitor, in the exercise of his power, would think proper to make or sanction. The Court therefore directed the petition to stand over until an application had been made to the Lord Chancellor, who was the visitor. An application was accordingly made to him, and after the matter had been greatly discussed before him *in camera*, as visitor, the matter terminated in this way:—"A petition was presented to the Lord Chancellor, as visitor, to obtain for the children of Dissenters a participation in the benefits of the school by an alteration of the rules. The governors of the school objected to his jurisdiction to make any order, but they having, at his Lordship's suggestion, voluntarily made a new statute, dispensing, in favor

(a) 18 *Beav.* 256.

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in favor of Dissenters desiring it, with their compulsory attendance at church and with their learning the Church of *England* catechism, the Lord Chancellor declined to make any order (a)." It therefore ended in that negative way, that the Lord Chancellor, as visitor, thought that the exigency of the case did not require any further interference on his part; but the new regulation went to this extent:—that no child should be compelled to learn the catechism of the Church of *England* or to attend church whose parents were desirous that the child should be exempted from that part of the obligations of the rules. Accordingly, no decision was made upon the subject by the Court.

There is nothing, therefore, in the *Sherborne Grammar School Case* which, in the smallest degree, militates against the present contention, because the point on which this Court rested its opinion was this:—That the rules had been made in conformity with the charter, and as they were made by the power in whom the right of making rules was vested by the charter, this Court thought, that those rules should first of all be submitted to the proper authority for revising them. That was something like the decision in *Foss v. Harbottle*, where the Court refused to interfere with the internal regulation of a public company, as to matters within the control of a general meeting, referring them to what may be called a domestic tribunal.

The MASTER of the ROLLS.

The difficulty that I have felt in cases like the *Sherborne Grammar School* is this:—Where a trust is declared

(a) 18 *Beav.* 285.

clared of a charity, it can only carry that trust into effect. The Master of the Rolls or the Vice-Chancellor cannot alter regulations made in conformity with the trust, but the Lord Chancellor, representing the Crown as visitor, and sitting *in camera*, could do it. Here the Crown is the visitor of this charity, having founded it, and a visitor may, from time to time, regulate the rules and regulations of the charity, in such a manner as he shall think fit, and adapt them to the changes which time has produced: the Lord Chancellor, therefore, representing the Crown, has a jurisdiction in these matters, which the Court of Chancery has not, and which the Lord Chancellor himself does not possess when sitting as Lord Chancellor, but only as the representative of the Crown as visitor. That is the view I took in the *Sherborne Grammar School Case*, that when the Crown founded the grammar school, it empowered the trustees to make rules, from time to time, with the advice of the Bishop of the diocese; but the Crown still remained the visitor, and might control that power within certain limits; the Court of Chancery has no such jurisdiction. Not only was that my view, but it was that of Lord *Macclesfield*, who was a very eminent and competent judge, notwithstanding the circumstances which led to his removal from office. Lord *Cranworth*, in the *Sherborne Grammar School Case*, seems to have adopted the same view, judging from the note that Mr. *Beavan* has attached to the case. The governors said they preferred reforming themselves to being reformed by the Court, and the Lord Chancellor acceded to that view of the case. I think this a case that ought to follow the same course.

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The *Attorney-General*.—This occurred in the *Chelmsford*

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ford School Case (a) :—The Attorney-General, whose duty I think it has been on all these occasions to contend for the largest possible comprehensiveness in a charity, had brought in a scheme, exempting children, whose parents should object, from being taught the doctrines of the Church of *England*, while the proposal of governors made teaching according to the doctrines of the Church of *England* compulsory. The Court struck out both suggestions, leaving a direction that the religious instruction should be according to the ordinances made by the governors. Nothing at all, therefore, seems to have been decided, except that there should be religious instruction, and that that instruction should be in conformity with the statutes and ordinances to be made, from time to time, by the governors, pursuant to the powers contained in the charter.

In *The Attorney General v. The Sherborne Grammar School (b)* it is stated, that the Attorney-General was “proceeding to open the case as distinct from the case of the relators,” which would seem to imply that the Attorney-General took a different view from the relators and gave way to them. Such was not the case, if it had been, it would have been his duty to have taken the information out of their hands.

They also referred to the following unreported cases :—*Attorney-General v. The Basingstoke School* ; *In re the Grantham School* ; *In re the Norfolk School*.

Mr. *Kenyon*, *contra*, was not called on.

The

(a) 1 *Kay & J.* 543.

(b) 18 *Beav.* 264.

The MASTER of the ROLLS.

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I do not see how I can consistently with my decision in the *Sherborne Grammar School Case* (a) hold this to be other than a Church of *England* charity. So treating it, I must carry into effect the trusts of a Church of *England* Grammar School, and in that case, if this were an information confined to this matter alone, I should do nothing but appoint trustees who are members of the Church of *England*, and leave them to frame their ordinances, and I should consider that I had no jurisdiction to do anything further.

I lament my inability to expand the school and adapt it to the circumstances of the time; but that is a matter of private feeling. Sitting here as a judge, I have no power or jurisdiction to alter the trusts of the charity. I have not the slightest doubt of what these trusts are, and that being a Church of *England* charity and for Church of *England* purposes, I am bound to appoint trustees who are members of the Church of *England*, and to leave them to frame such regulation as to religious instruction as they may think fit for that purpose. They will then be subject to the controlling power of the visitor.

(a) 18 *Beav.* 256.

NOTE.—The scheme for the government of the school as ultimately approved of by the Master of the Rolls, so far as regarded the questions argued, was in the following terms:—

1. The full number of trustees of the Charity shall be seventeen, and every trustee shall be in communion with the Church of *England*.

8. The master and under master of the school, who shall always be members of the Church of *England* and graduates of one of the universities in *Great Britain* or *Ireland*, shall be from time to time, as vacancies occur, appointed by the trustees, &c.

12. The scholars in the said school shall be carefully and diligently instructed in religion, according to such statutes and ordinances as shall be made, from time to time, by the trustees and Lord Bishop of
Lichfield,

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Lichfield, pursuant to the powers contained in the said letters-patent, and they shall also be carefully and diligently instructed in the *Greek, Latin, French and English* languages and literature, reading, writing, drawing, grammar, ancient and modern history, sacred and profane, geography, arithmetic and mathematics and the principles of natural philosophy, and also in such other languages, arts and sciences as the said trustees, with the advice of the said Lord Bishop of *Lichfield* for the time being, shall think proper and direct.

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DENTON v. LORD JOHN MANNERS.

January 12.
A bequest of money to a society established for assisting the owners of impropriate tithes, by money payments, to restore them to spiritual purposes, is void under the Statute of Mortmain, and is not rendered valid by the 13 & 14 Vict. c. 94, s. 23.

THE testator *Lucius G. Kindersley*, by his will dated in 1855, expressed himself as follows:—"And all the residue of my property and effects, of what kind soever, after paying the aforesaid annuities and legacies, I give and bequeath to Lord *John Manners*, or the secretary for the time being of *The Association for buying Improprate Tithes and revesting them in the Church of England*. And I declare, that in case, at my death, any part of my property is invested in real estate, or railway shares, or any other security which would make a gift to a charitable use void and invalid, such property, so invested, shall be applied towards payment of my debts and other liabilities, and that all my purely personal estate be applied to the above-mentioned charitable purpose."

The testator died in 1855.

By the decree, an inquiry was directed as to what charity the testator intended by the above gift. The Chief Clerk certified certain facts relative to this matter, without drawing any conclusion therefrom.

The charity referred to was admitted to be "The Tithe

Tithe Redemption Trust," instituted in 1845, and supported by voluntary contributions alone. The plan of the society stated, "that its object was to procure the restoration to the Church of the tithes of which she had been deprived, by collecting contributions, for aiding the willing-minded, *by compensation*, to give back such tithes as they might be possessed of." Subscriptions and donations were accordingly collected for that purpose.

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In the report of the society in 1850 it was stated, that "The Tithe Redemption Trust" was a Church association, having for its specific object the *redemption* of appropriate tithes, and their restoration to the parishes whence they arise." And by the same report the objects and mode of operation of the trust were more particularly stated and defined in the manner following :—

"Objects of the trust:—1. To give to owners of alienated tithes an opportunity of restoring them to the spiritual purposes for which they were originally ordained, and to assist them in so doing. 2. To apply any tithes thus restored towards relieving the spiritual destitution of the parish or chapelry whence they arise, by adding to the endowment of such parish church or chapel, or by the endowment of new districts therein. 3. To apply to Parliament to facilitate the means of accomplishing these objects:—i., by rendering the mode of conveyance of tithes less expensive; ii., by enabling persons having limited interests in impropriate tithes to reconvey them, upon adequate compensation being given; and, iii., by enabling owners of impropriate tithes to give them by will for the endowment of the church in the place whence they arise."

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The association had, by publications and correspondence, circulated information as to alienated tithes and the mode of legally restoring them, and had hired rooms and paid a secretary.

The certificate also found that by these and other means "The Tithe Redemption Trust" had been instrumental in causing tithes and portions of tithes to be, in several cases, voluntarily restored or sold for reduced prices, as endowments for the incumbent of the parish or district in which they arose, and that in several cases, "*the trust*" had, according to the means at their disposal, paid money in aid of the purchase and restoration, as aforesaid, of such tithes, and had provided and defrayed the expenses incident to restorations, and the expenses of obtaining legal advice and assistance for persons desirous of giving or restoring tithes, and of the conveyance necessary or proper for such purpose; and that, in such operations, "*the trust*" had expended considerable sums of money which had arisen from donations and subscriptions paid to them for the general purposes of the trust.

That in further pursuance of their objects "*the trust*" have made and caused to be made application to Parliament for enactments to facilitate the means of accomplishing their object.

The next of kin alleged that the objects of the association were:—1st. To give to owners of alienated tithes an opportunity of restoring them to the spiritual purposes for which they were originally ordained, and to assist them in so doing by paying money in aid of the purchase and restoration of such tithes. 2ndly. To buy or aid in buying tithes to be so restored. 3rdly. To apply any tithes thus restored towards relieving the
 spiritual

spiritual destitution of the parish or chapelry whence they arose, by adding to the endowment of such parish church or chapel, or by the endowment of new districts therein. 4thly. To apply to Parliament to facilitate the means of accomplishing these objects.

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The question of the validity of this charitable gift now came on to be argued.

The 13 & 14 *Vict.* c. 94, being "An Act to amend the Acts relating the Ecclesiastical Commissioners for *England*," was relied on in argument, the 23rd section of which is as follows :—"That the owner or proprietor of any impropriation tithes, portion of tithes or rent-charge in lieu of tithes, shall and may have power to annex the same, or any part thereof, unto the parsonage, vicarage or curacy of the parish church or chapel where the same lie or arise, or to settle the same in trust for the benefit of such parsonage, vicarage or curacy, any statute or law whatsoever to the contrary thereof in any-wise notwithstanding."

Mr. *Follett* and Mr. *Wolstenholme*, for the Plaintiff.

Mr. *Selwyn* and Mr. *Kenyon*, in support of the charitable gift, argued, first, that the objects of the society were not exclusively the purchasing and restoring tithes, but to induce others to restore them; *Philpott v. St. George's Hospital* (a); and to expend the funds in advertising and obtaining and furnishing statistic and other information for that purpose. That this, as the bequest might be lawfully applied in this latter mode without offending against the provisions of the Statute of Mortmain,

(a) 21 *Beav.* 134; 6 *H. L. Cas.* 338.

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Mortmain, the option of effecting a legal object legalized the bequest; *University of London v. Yarrow* (a).

Secondly, that the 13 & 14 *Vict.* c. 94, s. 23, expressly authorized the owner of impropriate tithes to annex them to the living, and that if the owner could do so, there was no reason why any other person should be prevented in assisting him in effecting so laudable and lawful an object. They also cited *Edwards v. Hall* (b); *Myers v. Perigal* (c); *Walker v. Milne* (d); *Doe d. Myatt v. The St. Helens, &c. Railway Company* (e); *Shadbolt v. Thornton* (f); *Anon.* (g).

Mr. *Batten*, for the secretary of the institution.

Mr. *R. Palmer* and Mr. *Osborne*, for the next of kin were not called on.

The MASTER of the ROLLS.

I am of opinion, that this society, as constituted, cannot legally take a legacy, even of pure personalty, from any person by will. I wish to state the proposition as broadly as possible, that in my opinion, it is prohibited by the Statute of Mortmain. In the first place, look at what the Statute of Mortmain provides. The Statute of Mortmain says, "that whereas alienations of hereditaments in mortmain are prohibited or restrained by *Magna Charta* and divers other wholesome laws," &c. &c., "and that this public mischief has of late greatly increased, therefore, it is enacted, that after the 24th of *June*, 1736, "no manors," &c. &c. "*nor any sum or*

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| (a) 23 <i>Beav.</i> 159; 1 <i>De Ger</i> | 16 <i>Sim.</i> 533. |
| & <i>Jones</i> , 72. | (d) 11 <i>Beav.</i> 507. |
| (b) 11 <i>Hare</i> , 1; 6 <i>De G., M.</i> | (e) 2 <i>Q. B.</i> 364. |
| & <i>G.</i> 74. | (f) 17 <i>Sim.</i> 49. |
| (c) 2 <i>De G., M. & G.</i> 599; | (g) 2 <i>Vent.</i> 349. |

sums of money, goods, chattels, stocks in the public funds, securities for money or any other personal estate whatsoever to be laid out or disposed of in the purchase of any lands, tenements or hereditaments shall be given, granted," &c. to any person for any estate or interest whatsoever, or anyways charged or incumbered, by any person whatsoever, in trust or for the benefit of any charitable use whatsoever, unless in the manner thereby prescribed. You cannot have more distinct words to shew, that no money or personal estate to be laid out in the purchase of lands, tenements or hereditaments (which includes incorporeal hereditaments as tithes) shall be granted, &c. in trust for any charitable use whatever, except in a particular manner. The 3rd section makes such prohibited gifts null and void. It is clear, therefore (unless this is repealed by some subsequent statute), that a bequest of money, to be laid out in the purchase of hereditaments to be put in mortmain, for charitable trusts, would be expressly within prohibition of this Act. It would be as much within the prohibition of the Act, and within the exact words of it, as a bequest of money to buy lands to be conveyed to a charitable institution.

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The words are, "any charitable uses whatsoever," and the next question is this:—What are the objects and purposes of this institution, and are they the putting incorporeal hereditaments into mortmain? I find that this institution is called by the title of the "Tithe Redemption Trust" or "The Tithe Redemption Trust for the Church in *England* and *Wales*," and that the objects of the institution are these:—In the first place, "to give to the owners of alienated tithes an opportunity of restoring them to spiritual purposes for which they were originally ordained, and to assist them in so doing." How can money "assist" persons in so doing, except

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cept it be given for the purpose of buying them, and then devoting them to that purpose. As was very justly observed, the owners of impropriate tithes may now give them for spiritual purposes, totally independent of the act of the Queen, to which I will presently refer, if they think fit to comply with the provisions and conditions of the Mortmain Act. But how could it be held, that a society, established for the mere purpose of inducing persons, by a pecuniary consideration, to do so, can take money by will for that purpose? The object is plainly and exactly the same as a simple bequest of money for the purpose of buying land and building almshouses or schools upon it, a very laudable and worthy object, and what any person may himself do, if he thinks fit, provided he complies with the formalities prescribed by Statute of Mortmain. But if a society were established for the purpose of buying lands and devoting them to schools and almshouses, could they take a bequest for the purpose of buying lands, and then settling them on those charities? It is obvious that the scope and object of this society is not to induce persons of themselves and of their own mere motion to restore tithes to the church, by means of their advice and information, but to do so by aiding and assisting them with a pecuniary consideration.

The second object of the institution is, "To apply any tithes thus restored, towards relieving the spiritual destitution of the parish or chapelry whence they arise, by adding to the endowment of such parish church or chapel, or by the endowment of new districts therein." Now the 13 & 14 *Vict.* c. 94, s. 23 (a), seems to me to give a
 power

(a) By the 17 *Car.* 2, c. 3, s. 7, them to the parsonage "without the owner of impropriate tithes any licence of mortmain." It were enabled to give and annex was extended by the 1 & 2 *Will.* 4,

power to the impropiator of tithes, exclusively, to annex them to the parsonage "where the same be or arise," but not to devote them to any other spiritual purposes, but the second object of this institution goes beyond it, because it is not only to give the owner an opportunity of restoring them to the spiritual purposes for which they were originally ordained, but, when restored, to apply them either for the purpose of adding to the endowment of the parish whence they arise, "or by the endowment of any new districts therein."

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Whether that is within the scope of the Act of Parliament I have not ascertained, but it is quite clear, that there are many parishes which, according to the opinion of many persons, are highly endowed at present, and in which there are impropriate tithes, which might be usefully employed for the assistance of other poor livings, but not for the purpose of increasing an endowment which is already considered sufficient. I have not collected that the endowment of certain new districts, though proper, would be within the scope of the Act of Parliament of the 14th of the Queen. But whether that is so or not is wholly immaterial, for I will assume that it is, and that it is made lawful by the Act of Parliament. It can in no respect affect the question, whether a person is authorized to do an act by the general law of the country or by Act of Parliament. Before the Statute of Mortmain passed, a person might, in his lifetime, have given lands for the establishment and institution of a school. Since the statute of George II., he can only do so by a deed enrolled within

six

c. 45, s. 11. The act *Car.* 2 was followed the 13 & 14 *Vict.* c. 94, repealed by the 1 & 2 *Vict.* c. 106, s. 23 (see *ante*, p. 41). See also s. 15, but was revived by the 23 *Hen.* 8, c. 10, ss. 1, 2. 6 & 7 *Vict.* c. 37, s. 25. Then

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six months after the execution of it, and provided he himself survives the execution of the instrument twelve months; but he is unable to do so by will. Assume that he is afterwards at liberty to devise lands for that purpose, in particular circumstances and under particular conditions, still the Statute of Mortmain prohibits a person from doing that by will under all other circumstances. If, therefore, a society is established for the purpose of inducing persons, for a pecuniary consideration, to alien the lands for the benefit of a charity, and to put them in mortmain, that falls within the prohibition: and, in the absence of any statute repealing the act of Geo. 2 in this respect, I have no doubt, that under the words of that act, and the construction put upon it by the decisions of the Courts, a bequest of money to such a society to be applied to such purposes would be void.

A man may give land for the purpose of a charity in such manner as he thinks fit, provided he complies with the conditions of the Statute of Mortmain, but he cannot give lands to charity by will, or make a bequest of money to be laid out in lands or hereditaments for that purpose.

It is contended, that because this society is interposed between the testator and the object for which the bequest is given, that interposition of a third body, through whom the inducement is to pass, makes the bequest valid; but I am of opinion, that it leaves the matter exactly as it was before, and that the gift is as invalid under the act, as if the bequest were direct for the purposes contemplated by the society: it is in substance a bequest of money to be laid out in lands and hereditaments to be applied to charitable purposes.

I am

I am of opinion, that the whole of this bequest fails, without any regard whatever to the sources from whence the money came, and even upon the assumption, that it is all pure personalty. It, therefore, goes to the next of kin.

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Affirmed by the Lords Justices, 5th July, 1858.

TYLER v. THOMAS.

**THOMAS LLEWELLYN PARRY**, by his will dated the 16th of *June*, 1834, devised an estate called *Nantypopty* to *Thomas Parry Thomas* in fee, and he gave all his other real estates to *Judith Parry* for life, with limitations to her sons and daughters in tail, with remainder to the right heirs of the testator.

January 14.  
Interests of  
Defendants  
*inter se*, arising  
out of the  
rights of the  
Plaintiffs, pro-  
tected by the  
doctrine of *lis*  
*pendens*.

The testator died in 1836. He left no heir; and the reversion devised to his right heirs escheated; the freeholds to the Crown, and his copyholds to the lord of the manor of whom the same were holden.

In a suit in-  
stituted by cre-  
ditors for the  
administration  
of the testator's  
estate, the de-  
ficiency of the  
personal estate  
for payment of  
the debts was  
payable out of  
two real estates

devised separately to the Defendants *A.* and *B.* In 1846, the debts were ordered to be paid out of *A.*'s estate alone, without prejudice to his right of contribution against *B.*'s estate. In 1852, the suit was registered as a *lis pendens*, and two months afterwards *B.* mortgaged his estate to *C.*, who had no notice of *A.*'s rights. Held, that there was a *lis pendens* as regarded *A.*'s rights, and that *C.*'s mortgage must be postponed to *A.*'s claims.

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1836. *Brown v. Lloyd*, creditors' suit.  
1837. Decree.  
1841. *Evans v. Brown*.  
1842. Decree.  
1844. Sale ordered without prejudice.

1846. Payment of debts ordered,  
without prejudice.  
March 1852. *Brown v. Lloyd*, registered.  
May 1852. Mortgage to *Glencross*.  
1855. *Tyler v. Thomas*.

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In *December*, 1836, a creditors' suit of *Brown v. Lloyd* was instituted for the administration of the estate of the testator, by *Brown* and other creditors, on behalf, &c., against *Lloyd* (the executor), *Judith Parry* (an infant), *Thomas Parry Thomas*, and the Attorney-General. The Attorney-General was made a party in respect of the escheat of the reversion.

In 1837, a decree was made directing the accounts, under which the personal estate was found insufficient for the payment of the debts. In 1841, the Crown made a grant of the reversion to *Brown* and others, on trust to sell and pay the debts.

Mr. *Adams*, the lord of the manor of which the copyholds were holden, however, claimed the reversion in fee beneficially, by escheat, whereupon a supplemental suit of *Evans v. Brown* was, in *April*, 1841, instituted by other creditors of the testator against *Brown* (the grantee of the Crown) and against the Plaintiffs and Defendants in *Brown v. Lloyd*, and against Mr. *Adams* the copyhold lord, in order to make the copyholds (including the reversion) available for the payment of the debts.

At the hearing of the latter cause (*Evans v. Brown*) in 1842, the right of the creditors, as against the title of the lord by escheat, was established (a).

By an order made upon the hearing of both the causes on further directions, and of a petition, on the 15th of *February*, 1844, it was ordered, that the real estates of the testator (except the farm and lands called *Nantypopty* and the copyholds) should be sold, and that the money should be paid to the credit of the  
 cause

(a) 5 *Beav.* 114.

cause of *Brown v. Lloyd*. And it was ordered, that such sale should be without prejudice to the rights (if any) of *Judith Parry* and her issue of contribution against *Nantypopty*; and the consideration of all further directions was reserved.

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This part of the testator's real estate was sold accordingly, and the produce invested in 6,460*L.* Consols.

By an order made on further directions on the 27th of *June*, 1846, the personal estate, the produce of the real estate, and the rents, were ordered to be sold, and thereout the debts and costs were directed to be paid, and the residue was ordered to be carried to the credit of the first-mentioned cause generally. But these payments were to be made without prejudice to the rights (if any) of *Judith Parry* in respect thereof, and also without prejudice to the rights (if any) of her and her issue against *Nantypopty*.

About 4,000*L.* of the produce of the real estate were accordingly applied in payment of the testator's debts.

The first-mentioned suit of *Brown v. Lloyd* was duly registered on the 22nd of *March*, 1852. On the 21st of *May* following, *Thomas Parry Thomas* conveyed the *Nantypopty* property to *Mrs. Glencross* in fee, by way of mortgage, to secure a sum of money, but she had no notice of the suit.

*Judith Parry* (now *Judith Tyler*), and others, instituted this suit in *December*, 1855, against *Thomas Parry Thomas*, *Mrs. Glencross* and others, insisting, that the moneys paid, out of her estate, in discharge of the debts of the testator were more than she ought to

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contribute, and that she had a charge on the *Nantypopty* estate for the excess.

The bill prayed, amongst other things, a declaration that *Nantypopty* was liable and ought to contribute (together with the testator's other real estates) to the payment of such part of the testator's debts and the costs of suits and also such of the costs of this suit as the personal estate and the reversion were insufficient to pay; that the amount payable by *Nantypopty* might be raised by a sale or mortgage, the Plaintiffs offering, in case the mortgage made by *Thomas Parry Thomas* to Mrs. *Glencross* had priority over their claims, to redeem it.

The cause now came on for hearing, and the question was, as to the priority of the mortgage to Mrs. *Glencross*, made *pendente lite*, over the claims of the Plaintiff.

Mr. *Selwyn* and Mr. *Bevir*, for the Plaintiffs, argued, that the mortgage having been made pending the litigation, the mortgagee had notice of the rights of the parties, and took subject to them.

Mr. *Baggallay*, for *Thomas*.

Mr. *Teed* and Mr. *Nalder*, for Mrs. *Glencross*.

The doctrine of *lis pendens* did not apply until the suit had been registered in *Murch*, 1852 (a). At that time, the *lis pendens* had ceased, for the suit had been exhausted and finished (as regarded the Plaintiffs, the creditors,) by the decree in 1846, which directed payment of their demands, and under which they have been satisfied. The case is similar to *Kinsman v. Kinsman*,

(a) 2 Vict. c. 11, s. 7.

*man* (a), in which the debts and costs were paid in a creditors' suit by the sale of one of two devised estates, and the Court directed the master to settle the proportion which was to be borne by the other devised estate. The devisee of the estate so sold was entitled for life only; and he, being an ignorant person and a day labourer, took no proceeding under this direction for twenty-six years; at the end of that time, the other devised estate had been sold to a *bonâ fide* purchaser without notice. A bill was filed to charge the purchaser of the other devised estate with the proportion which it ought to have contributed towards the debts and costs, and the Master of the Rolls held, that there was a *lis pendens*, amounting to equitable notice of the charge; but on appeal, the decree was reversed by the Lord Chancellor, on the ground that there was no *lis pendens* at the time of the purchase.

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Mrs. *Glencross* had no actual notice of the present claim: that is not even suggested, and it has been settled, that the doctrine of *lis pendens* does not depend on the principle of constructive notice; *Bellamy v. Sabine* (b).

The suit of *Brown v. Lloyd* being registered, the Defendant *Glencross* may be taken to have known of that suit, and of the equitable rights of the Plaintiff therein, but not of those of the co-Defendants to the suit, as between themselves. The Plaintiff's rights in the present suit arise not out of the matters in litigation in *Brown v. Lloyd*, but out of the arrangement between the Defendants in the suit in 1844 and 1846, by which the debts were, by consent, paid out of a portion of the real estate.

*Lis*(a) 1 *Russ. & Myl.* 617.(b) 26 *L. J. (Ch.)* 797.



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Lis pendens does not affect the title of an alienee of a Defendant of a right not interfering with the title of the Plaintiff in the pending litigation. Here the claim of *Glencross* in no manner interferes with the right of the creditors, the Plaintiffs in the suit of *Brown v. Lloyd*, which is the only one registered.

In *Bellamy v. Sabine* (a), *John Bellamy*, on the 8th of *June*, 1827, agreed to sell his interest in an estate to his son *Edward*, who on the 22nd of *June*, 1827, agreed to sell it to his solicitor *Bellamy*, and the estate was conveyed to him. In 1830, *Edward's* heir instituted a suit against *Sabine* and *John Bellamy* to set aside both transactions, and by the decree in 1835 the bill was dismissed as regarded the contract with the father, but set aside as regarded the contract with *Sabine*, and *Sabine* was ordered to convey the estate to the Plaintiff on payment of what was due to him. In 1833, *Sabine* mortgaged the estate to *Brickenden*. Afterwards *John Bellamy*, not having received the purchase-money, instituted a new suit for specific performance. In that suit, the Vice-Chancellor *Wood* held, that *John Bellamy's* lien for purchase-money had priority over the mortgage of 1833, from *Sabine* to *Brickenden*, on the doctrine of *lis pendens*; but the decision was reversed by the full Court of Appeal on the 1st of *August*, 1857. They held, that the doctrine of *lis pendens* did not rest on implied or constructive notice, and that it was inapplicable to rights as between co-Defendants which were not in litigation in the suit.

The Plaintiff may be entitled to stand in the place of the creditors, in regard to the devisee of the *Nantypoty* estate, because, having a right against both estates, the creditors

(a) 2 *Phillips*, 425, and 26 L. J. (Ch.) 797.

creditors have been paid out of one only, and the owner of the other estate has a right of contribution. Though as between the Plaintiff and *Thomas Parry Thomas* the Plaintiff may have this right, still it was not the subject of the litigation, and it does not affect an alienee of the Defendant having the legal estate, unless he had notice of the Plaintiff's equity when he purchased; but the *lis pendens* did not give notice, and this is the only notice alleged by the bill. Mrs. *Glencross* is therefore entitled to priority over the Plaintiff.

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The MASTER of the ROLLS said he was unable to concur with Mr. *Teed's* argument, and that he did not think, that the Court, in *Bellamy v. Sabine*, meant to lay down, as a principle, that where a distinct decree is made in favour of one Defendant against another Defendant, the doctrine of *lis pendens* does not apply. He said that the point was very important, for there were many cases in which the Plaintiff had no interest at all, as in cases of interpleader and suits instituted by executors or trustees to have the rights of all parties determined.

That if, in the course of proceedings in a suit, a decree were made for a conveyance from one Defendant to another, to be settled in chambers, which was not very unusual, it would be very extraordinary, if, after the suit has been registered as a *lis pendens*, the person ordered to convey might sell it to a third person, who might set up for a defence, that he was a purchaser for valuable consideration without notice.

If creditors, who are Plaintiffs, were ordered to be paid their debts out of two estates, could a Defendant, the owner of one of them, after the suit had been registered, sell his estate which was liable to contribute? This, his

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Honor said appeared to him to be a startling proposition, and unless he could understand that the contrary had been laid down by the Court of Appeal, he should hold, that a purchaser having notice of the suit, not actual but constructive, by its being registered as a *lis pendens*, must be taken to have notice, that the Court had made a decree that one Defendant had a right to stand in the shoes of the other.

His Honor was of opinion, that the mortgagor could only give to his mortgagee, pending the suit, such title as he had, and this suit being registered, that he could only give a mortgagee subject to the equitable rights which had been declared by the Court.

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23.

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Bequest to *A.* for life, and afterwards to his children, and in default, "then" unto the persons "of the blood or next of kin" of the testator "as would, by virtue of the Statute of Distributions, have become and been then entitled there-

THE testator, the Rev. *Andrew Downes*, died in 1820.

By his will, he bequeathed his residue to three persons, whom he also appointed executors, "upon trust" to get in and invest, and to pay his debts, and an annuity of 600*l.* a year to his wife for life and other bequests, and subject thereto, to pay the interest of the purchase-moneys, &c. to his son *Robert Downes* for life, and

to, in case the testator had died intestate." *A.* died without issue. Held, that the class comprising the ultimate gift was to be ascertained on the death of the testator, and not of *A.*, and that the class took as tenants in common, notwithstanding the exclusion of the testator's widow.

Parties claiming a portion of the residue held not barred after twenty years delay either by the statute or by laches, the fund still existing as a trust fund, and all parties having acted under a misconception of rights.

Legatees held not liable to refund, at the suit of other legatees, payments voluntarily made to them by the executors, under a mistake, but held liable to recoup out of the undistributed funds in which they were interested.

and afterwards to his children (but not giving vested interests at their births). The will then proceeded as follows :—

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“ And in case there shall not be any child or children of my son *Robert Downes*, who, under the trusts aforesaid, shall obtain a vested interest in the said trust moneys, stocks, funds and securities, *then* do and shall stand and be possessed of and interested in the said trust moneys, stocks, funds and securities, and the interest, dividends and annual produce thereof (but subject to the several annuities hereinbefore mentioned), *in trust for and to pay*, assign and transfer the same moneys, stocks, funds and securities *unto such person and persons of the blood or next of kin of me, Andrew Downes, as would, by virtue of the Statute of Distributions of Intestates' Effects, have become and been then entitled thereto in case I had died intestate.*”

The testator at his death left five children surviving, namely, his son *Robert* and four daughters, who were at that time his next of kin.

Robert Downes married, but he died in *February* 1832, without having had any issue. His four sisters survived him, and the Plaintiffs were his executors and executrix.

Upon the death of *Robert Downes*, the executors, acting on the notion that the residuary estate belonged to the four daughters alone, as the next of kin of the testator ascertained at that time, made some distribution of the fund amongst them in 1834 and 1842, excluding therein the representatives of the son *Robert Downes*. There still, however, remained a considerable portion of the residue under the control of the executors.

This

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This bill was filed in *February*, 1856, by the representatives of *Robert Downes*, for an account of the testator's estate, and praying a declaration, that the Plaintiffs were entitled (as the executrix and executors of *Robert Downes*) to one-fifth part of the clear residue of the estate of the testator.

The cause now came on for hearing.

Mr. *R. Palmer*, Mr. *Selwyn* and Mr. *Toller*, for the Plaintiffs. The representatives of *Robert* are entitled to one-fifth of the residue, for the next of kin of the testator are to be ascertained, not at the death of his son, but at the death of the testator; *Gundry v. Pinniger* (a); *Cable v. Cable* (b). The word "then" is not an adverb of time, but refers to the particular event on which the next of kin are to take; *Wheeler v. Adams* (c), and see *Markham v. Ivatt* (d), and *Wharton v. Barker* (e).

The Statute of Limitations is set up, but it is no defence, for this is the case of a trust; *Phillipo v. Munnings* (f); and the doctrine of laches is inapplicable under the circumstances of the present case; *Mills v. Drewitt* (g).

Mr. *Lloyd* and Mr. *Bush*, for the surviving executor of the testator's will, and for two of the daughters.

1. Upon the construction of the will, the next of kin were to be ascertained when the fund became distributable.

(a) 14 *Beav.* 94, affirmed 1 *De G., M. & G.* 502.

(b) 16 *Beav.* 507.

(c) 17 *Beav.* 417.

(d) 20 *Beav.* 579.

(e) Vice-Chancellor *Wood* (30 *Ap.* 1858).

(f) 2 *Myl. & Cr.* 309.

(g) 20 *Beav.* 632.

table. It is not a gift to the two next of kin *simpliciter*, but to those who "*would*" have become "*then*" entitled in case the testator had died intestate. This clearly indicates an intention to confine the gift to such persons as should answer the description of the testator's next of kin at the death of the tenant for life; *Butler v. Bushnell* (a); *Potts v. Potts* (b).

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2. The claim of the Plaintiff is barred by the Statute of Limitations(c). The testator died in 1820, the right accrued in 1832, on the death of the son without issue, and the bill was not filed until 1856, or twenty-four years after. This was not a trust within the 25th section, for every act which the executors had to do had reference to their character of executors, and not to that of trustees, they were executorial duties.

3. But even if this be a trust, the right is barred by lapse of time, with full knowledge of the terms of the residuary gift; *Browne v. Cross* (d), which was the case of a trust. Here the family have all along acted on a certain construction of the instruments, and family arrangements have been made on the faith of it. A provision was made for *Robert Downes* by his mother, on the belief that he was excluded from the benefit of the ultimate limitation. In *Clifton v. Cockburn* (e), Lord *Brougham* observed—"It is unnecessary to cite authorities to shew how strongly the Courts always lean in support of family arrangements and how reluctantly it will disturb them." It is impossible to remit the parties to the position, in which they would have

(a) 3 *Mylne & K.* 232.
 (b) 3 *Jones & Lat.* 353, and 1
House of Lords Ca. 671.

(c) 3 & 4 *Will.* 4, c. 27, s. 40.
 (d) 14 *Beav.* 105.
 (e) 3 *Myl. & K.* 76.

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have been if this construction had been insisted on at the proper time.

4. But here the Plaintiffs have no interest; for assuming that the class was to be ascertained at the death of the testator, still his five children took as joint tenants; *Withy v. Mangles* (a); *Baker v. Gibson* (b); for this is not a gift according to the statutes, or as in *Holloway v. Radcliffe* (c), but the statute is referred to only for the purpose of ascertaining the objects, and not for defining their shares. *Robert Downes* having died without having severed the joint tenancy, the whole residue survived to the other joint tenants, and the Plaintiffs, his representatives, have therefore no interest.

5. The executors have acted *bonâ fide*, and ought not to be made responsible for proceeding on a view of the law which was justified by the decisions at the time. The law has since been altered by the more recent cases; but at the death of the testator and of *Robert Downes*, the authorities were all in favour of the next of kin as ascertained and fixed at the death of the tenant for life; *Marsh v. Marsh* (d); *Long v. Blackall* (e); *Miller v. Eaton* (f); *Briden v. Hewlett* (g). A Court of Equity will not direct payments, made under a mistaken construction of a doubtful clause in a settlement, to be refunded, after many years of acquiescence by all the parties; *Clifton v. Cockburn* (h); especially in this case, where many of the parties are dead, and the law has undergone an alteration by more recent decisions.

Mr.

(a) 4 *Beav.* 364, and 10 *Clark & Fin.* 215.

(b) 12 *Beav.* 101.

(c) 23 *Beav.* 163.

(d) 1 *Bro. C. C.* 293.

(e) 3 *Ves.* 486.

(f) *G. Cooper*, 272.

(g) 2 *Myl. & K.* 90.

(h) 3 *Myl. & K.* 76.

Mr. *Berkeley* for the representatives of a third trustee.

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Mr. *Bagshaw* and Mr. *Rasch*, for another daughter and her husband (Mr. and Mrs. *Morley*). The class is to be ascertained at the period of distribution, for here the testator uses the very words pointed out by the Court in *Holloway v. Radcliffe* (a) as leading to that conclusion. The Court says—"By referring to the statute, &c." The Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 40, applies to a residue, *Prior v. Horniblow* (b), and the Plaintiffs are barred by it, and also by their acquiescence; *Browne v. Cross* (c); *Bolton v. Powell* (d); *Parker v. Bloxam* (e); *Govett v. Richmond* (f); *Clifton v. Cockburn* (g); *Champion v. Rigby* (h).

2ndly. Mr. and Mrs. *Morley*, to whom the executors have voluntarily made payments, cannot be called upon to refund.

The MASTER of the ROLLS.

At present you need not trouble yourself on that point, for I adopt that view of the case, and I am of opinion that the Plaintiffs are not entitled to make the daughters refund; at the same time, they must receive nothing further, until the Plaintiffs have received an equal share with them.

Mr. *Follett* and Mr. *Amphlett* for the fourth daughter, Mrs. *Wiglesworth* and her family. Under the ultimate limitation,

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|--------------------------------------|----------------------------------|
| (a) 23 <i>Beav.</i> 169. | (e) 20 <i>Beav.</i> 295. |
| (b) 2 <i>Younge & C. (Exch.)</i> | (f) 7 <i>Sim.</i> 1. |
| 200. | (g) 3 <i>Myl. & K.</i> 100. |
| (c) 14 <i>Beav.</i> 105. | (h) 1 <i>Russ. & M.</i> 539; |
| (d) 2 <i>De Gex, M. & G.</i> 1. | <i>Tamlyn</i> , 421. |

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limitation, the widow of the testator is excluded, being neither of the blood of or of kindred to the testator; *Garrick v. Lord Camden* (a); *Nichols v. Savage* (b).

If, therefore, the widow is excluded, it is impossible that the next of kin can take according to the statutes, for under it, they must take in common with the widow. Unless the word "unmarried" be introduced, the residue cannot be divided amongst them in the mode pointed out by the statute, and the five persons who take as a class must therefore take as joint tenants (c).

The MASTER of the ROLLS.

There is only one point on which I wish to hear a reply.

This is a suit by the legal personal representatives of the testator's son, who was one of the next of kin of the testator, asking for his share of the residue under the will, which is in these words—[*See ante*, p. 55.]—The first question is, what is the true construction of the will; and I am of opinion that I am bound by my previous decisions in *Gundry v. Pinniger* (d) and by *Cable v. Cable* (e), one of which was affirmed by the Lords Justices. I cannot, therefore, hold, that this class was to be ascertained at the death of the tenant for life.

The same difficulty which I have expressed in former cases arises here: why does the testator refer to the statute to ascertain the class, if he intended to describe a class not defined by the statute, but another class which the words of his will would have described, if he had

(a) 14 *Ves.* 372.

(b) *Cited* 18 *Ves.* 53.

(c) 2 *Jarm. on Wills* (2nd edit.)

(d) 14 *Beav.* 94; and 1 *De*

Ger. M. & G. 502.

(e) 16 *Beav.* 507.

had died at another period of time? The word "then" appears to me to mean "in that event," and the only construction I can give to this will is, that the testator meant the class of persons which he described to be those who became entitled, in the event of his son dying without children; and I think that the observations which I made in *Cable v. Cable* are applicable to this case.

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That being so, the first objection taken by the Defendants is, that the Statute of Limitations is a bar to the Plaintiff's claim. The testator died in 1820, the tenant for life died without issue in 1832, and this bill was filed in 1856. The Statute of Limitations therefore, if it has any operation, began to run in *February*, 1832, when the son died without issue, and the bill was not filed till twenty-four years after. The observation is, however, met by that which was stated in the opening, viz., that it is not an ordinary case of administration, but that the will created a clear trust "in trust for and to pay," &c.

The executors having put this money apart, they have divided some part, and they now hold the rest on the trusts of the will. Whether they are mere executors or have not been made trustees except by implication, in which case *Phillipo v. Munnings* would apply, it is not necessary to consider, because there are distinct trusts specified in the will respecting these sums for the persons entitled to them when they are set apart.

I am therefore of opinion that the statute has no application, and that it is impossible to say, that it has barred any claim of the Plaintiffs, if, under this will, they are entitled to a share in the residue, although I concur in this, that the fortieth section would apply to a residue.

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The next question is, whether the time which has elapsed independent of the statute and the acquiescence is a bar. This Court has certainly been very desirous not to allow persons to bring forward stale demands; but here the parties have acted on common mistake and on the apprehension and belief that *Robert*, the son, was excluded from all share in the ultimate residuary gift. It is the case of the Defendants themselves, with respect to other parts of the case, that such was the belief of all parties, and that being so, I cannot say, that there has been that species of laches as exists when persons are perfectly aware of their rights. Suppose this had been a case of election, could I say that these persons had elected, being in ignorance of their rights? I am told, that in consequence of this common mistake, the widow gave interests to her son and the Plaintiffs, which she would not have given, if this construction of the will had been made known to her, and that I cannot replace the parties in the same situation. I cannot speculate on that, it was a mere act of bounty on the part of the widow to her son, and it is impossible that this can vary the construction or operation of her husband's will.

I am of opinion, that I have no power to compel the other daughters, who were not in the situation of trustees, to refund anything which has been paid them; but I think that any future interest to which they may be entitled ought to be applied in recouping the Plaintiffs, to the extent of giving them an equal share with the other parties.

With regard to the point raised as to the effect of the exclusion of the widow, I should wish to have more time to consider it. The difficulty, as put by Mr. *Follett*, is this:—If these persons are to take according to the Statute of Distributions, one-third is undisposed of; what

what becomes of it, and what is the effect of this? Is not the only way of getting over it, to hold, that the statute determines the class, but not the mode in which they are to take?

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Mr. *R. Palmer* in reply on this point. The words "of the blood or next of kin of me" have the same effect as if the word "unmarried" had been introduced into the gift; which, it is admitted, would remove the difficulty. The testator says, expressly, the class are to take the whole residue, but as they "would take by virtue of the statute," that is, as if there were no widow. The statute 22 & 23 *Car. 2*, c. 10, s. 5, gives the widow one-third "and the *residue*, by equal portions, to and amongst the children" of the intestate; therefore what the widow does not take belongs to the children, and they take it as tenants in common, as pointed out by the statute; *Horn v. Coleman (a)*.

The MASTER of the ROLLS:—I will look at the case.

The MASTER of the ROLLS.

I have held, in various cases, that words similar to the present mean the persons who are really the next of kin of a testator at his death, and not those who would be the next of kin if he had died at the time when the distribution of the fund was to take place. In *Wheeler v. Addams (b)* I held, and I think that the construction is the same here, that the word "then" applies to the occurrence or the event on which the class were to take, and not to the time when that class was to be ascertained.

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But

(a) 1 *Smale & G.* 169.

(b) 17 *Beav.* 417.

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But I reserved my final judgment in this case, in order to consider the effect of the exclusion of the wife from the class to take under the Statute of Distributions. The argument used was this:—That the words “the persons of blood or next of kin of me” would exclude the widow, and therefore that the persons who take are not those entitled under the Statute of Distribution; that those words must have been introduced merely to point out the persons who were to take, and not the manner in which they were to take, and consequently, that even on the construction I have placed on the words, namely, that the five children take, as being the next of kin at their father’s death, still that they do not take in the manner pointed out by the statute, because, as they take the whole residue amongst them, the statute, which would only give them two-thirds, cannot apply:—that, therefore, the mode in which the class are to take must be discovered by some means other than by a reference to the statute, and that looking at the other words of the gift, they must take as joint tenants. The result of this would be, that on *Robert’s* death, his share survived to his four sisters.

After considering this argument and reading the will and the authorities, I am convinced that I should come to an erroneous conclusion if I were to adopt this view. I hold that the reference to the statute points out, not only the class but the manner in which they take.

The class is “the persons of his blood or next of kin as would by virtue of the Statute of Distributions of Intestates’ Effects have become and been then entitled thereto in case he had died intestate.” The persons therefore are, those who would have been entitled to the whole of his residuary personal estate in the same manner as if he had died intestate.

I think

I think that it would introduce distinctions which would fritter away the established rules of construction and produce uncertainty and litigation, if I were to say, that these words of reference to the statute apply to the class and not to the manner in which they are to take.

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I am of opinion that the Plaintiffs are entitled; that time is no bar, and that the Defendants must recoup out of the estate still remaining undivided.

NOTE.—An Appeal to the House of Lords has been prepared.

GOODWIN v. FINLAYSON.

Jan. 15, 29.

THE testator expressed himself as follows:—"First, that the rent of all my houses in *Paradice Street*, likewise the *Queen's Head in High Street, Marylebone*, shall go to pay off the mortgage that's incurred to pay for the new house in *Portman Place*, known by the name of "*The Portman Arms*," lately purchased by me, except what is wanted for repairs and taxes. So long as Mrs. *Bearcroft* continues single, she and our dearly beloved children *Harriett, Sarah* and *Samuel Bearcroft* shall equally partake of all the profits of the houses as above said, with the profits of the new house called "*The Portman Arms*," in *Portman Place*; and as each dies, his or her part shall be equally divided amongst the other's that living. But if my dearly beloved wife *Sarah Bearcroft* marries again, her part shall go from her, and shall be equally divided amongst her children that's living at the time of her so marrying again. But they shall allow her 10*l.* a year for the first ten years, then the 10*l.* a year shall cease for ever.

Bequest to four equally, "and as each dies, his or her part shall be equally divided amongst the others that's living." Held, that the accrued shares did not go over.
In construing a will plain and distinct words are only to be controlled by words equally plain and distinct.

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The profits of the new house called "*Portman Arms*," *Portman Place*, shall go to pay off the interest of the above mortgage, from time to time, till all is paid off, then the profits of the above house shall be *equally divided between* my wife, *Harriett, Sarah* and *Samuel Bearcroft*, our dear children, except my dearly beloved wife *Sarah Bearcroft* marries again, then her part shall cease and go to my children *Harriett, Sarah* and *Samuel Bearcroft*. And I do hereby appoint my dearly beloved wife *Sarah Bearcroft* and my brother *Benjamin Bearcroft* my only and sole executor and executrix to this my last will and testament."

The testator died in 1791; he left his widow *Sarah Bearcroft* and his three children *Samuel Bearcroft*, *Harriett Goodwin* and *Sarah Finlayson* surviving him.

Samuel died in 1808; *Sarah Finlayson* died in 1836; the widow died in 1840, without having married again, and *Harriett Goodwin* (the surviving daughter) died in 1855.

The *Portman Arms* alone remained; it was of leasehold tenure, and the mortgage referred to had been paid off.

The Plaintiff was the surviving husband of *Harriett*; the Defendant, Mrs. *Finlayson*, was the daughter of *Sarah*, and the legal personal representative of the widow, and of the testator, and she was now in the possession of the *Portman Arms*.

The bill prayed an account of the rents, for payment to the Plaintiff, for an assignment of the premises, and for a declaration of the rights of the parties.

Mr.

Mr. *R. Palmer* and Mr. *H. Stevens*, for the Plaintiff, argued that the *Portman Arms* had wholly devolved on Mrs. *Goodwin*, the last survivor of the four. That the gift over comprised the accrued as well as the original shares, both because the expression "his or her part" included every interest, and because there was an anxiety expressed by the testator that the property should be kept together and preserved in mass. They cited *Antrobus v. Hodgson* (a); *Cookson v. Bingham* (b); *Doe d. Borwell v. Abey* (c).

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Mr. *Lloyd* and Mr. *Shapter*, for the Defendants *Finlayson* and wife, claimed three-fourths of the *Portman Arms*. They argued, first, that the words, "so long as Mrs. *Bearcroft* continues single," governed the whole sentence. Secondly, that after the mortgage had been paid off there was a distinct gift to the four, as tenants in common, without any gift over, except of the wife's share on her marriage. Thirdly, that the accrued shares did not go over with the original shares, the word "part" being insufficient, according to the authorities, to carry them over. They cited *Douglas v. Andrews* (d); *Ex parte West* (e); *Crowder v. Stone* (f); *Bright v. Rowe* (g); *Perkins v. Micklethwaite* (h); *Vorley v. Richardson* (i).

Mr. *R. Palmer*, in reply, cited *Doe d. Clift v. Birkhead* (k).

The MASTER of the ROLLS :—I will consider the terms of the will.

The

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| (a) 16 <i>Simons</i> , 450. | (f) 3 <i>Russ.</i> 217. |
| (b) 17 <i>Beav.</i> 262; 3 <i>De G. M. & G.</i> 668. | (g) 3 <i>Myl. & K.</i> 316. |
| (c) 1 <i>Maule & S.</i> 428. | (h) 1 <i>P. W.</i> 274. |
| (d) 14 <i>Beav.</i> 347. | (i) 2 <i>Jurist</i> , N. S. 362. |
| (e) 1 <i>Bro. C. C.</i> 575. | (k) 4 <i>Exch.</i> 110. |

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The question is, whether, as *Harriett* was the survivor, the shares of the others in the rents of those houses did not pass over to her.

The words on which the Plaintiff relies are these: "and as each dies, his or her part shall be equally divided among the others that are living." On a repeated examination of these words, it appears to me that the plain and natural import of them is, that whenever any one of the four persons, viz., the widow and the three children, died, the share of that one was to go to the others. I cannot find any words to limit it to the share of one more than to the share of another; and if this be so, it is impossible, without straining the words, to give, what at first sight appeared to me, a probable construction, namely, that the operation of the whole will was to be limited during the lifetime of the widow. It would be an unauthorized construction to say that the words, "as each dies," applies to every child during the life of the widow, but no longer. It cannot stop there, it must extend to the division of the shares whenever the lives drop. The result of that would be, that if the will stopped at this place, there would be a clear direction, that they were to take as tenants in common, with a survivorship over, on the death of each, amongst the others then living.

A leading principle of construction is this: that words of plain and distinct meaning in a will are not to be controlled, except by words equally plain and distinct. Now, in this will, I do not discover words sufficient for this purpose. The words relied upon by the Defendant are these: that when the mortgage is paid off,

off, "then the profits of the above house shall be equally divided between my wife *Harriett*, *Sarah* and *Samuel Bearcroft*, our dear children."

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Now it is to be observed, that this applies solely to the *Portman Arms*, and that the former words apply to all the houses, including the *Portman Arms*. In this direction, there is certainly nothing contrary to the claim which is before me; there is nothing inconsistent with the direction, that on the death of each the share of that one is to go to the other. It merely directs that when the mortgage is paid off, the profits of the houses shall be divided amongst the four, "except my dearly beloved wife marries again, then her part shall cease and go to my children."

It is true that this standing alone would give no survivorship, and that there would be merely an equal division among them; but, in my opinion, unless these words contradict or expressly overrule the words previously used, they must be considered as having reference to the former disposition, the testator not having fully completed the terms of that disposition.

That being my view, the next question, which has caused me some difficulty, is with respect to the accruing shares, and the difficulty which arises on that is this: when *Samuel* died, his share went in thirds to his mother and two sisters, *Harriett* and *Sarah*. On the death of *Sarah*, was her third in her brother's share to be divided equally between her mother and sister under the provision of her father's will, or did it form part of her estate? So also, in the same manner, on the death of the mother, did her third in her son's share and her half in her daughter *Sarah's* original and accrued

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accrued share become part of her personal estate and pass by the will to *Harriett*. On this point I have certainly felt considerable difficulty, and I have consulted the authorities to be found on the subject.

It was contended, that this was one entire property, which the testator evidently intended to keep together, and that the accrued shares ought to follow the original shares; but then, on the other hand, in these words are included not one entire property, but several properties, for there are several houses, and *The Portman Arms* forms only one of them. It is true that in the result, *The Portman Arms* has become the only property, but I do not think that this is material, for to say that the accrued shares are to go over, if it is one property which the testator intends to keep together, but not otherwise, is a thin distinction, to be found only in some few of the cases. I believe it to be a mere question of construction, whether, on the whole will, you find an expression of the testator's intentions that the accrued shares should go over as well as the original shares. Now, without referring to the cases in detail, I may observe, that *Pain v. Benson* (a), which was a decision of Lord *Hardwicke*, has never been followed, and there are a great many subsequent cases in which it has been held, that the word "share" of itself is not sufficient to carry over accrued shares. This being a question of construction it must be governed by the other parts of the will. Here the expression is, "as each dies, his or her *part* shall be equally divided among the others that's living." I do not find in these words sufficient to shew, that the testator intended the accrued shares to go over as well as the original shares. The state of the authorities on this subject, I must say, appears

(a) 3 *Atk.* 78.

appears to me anything but satisfactory. I have read very carefully the case to which Mr. *Palmer* referred me of *Doe d. Clift v. Birkhead* (a), in which I think the principle on which the Chief Baron relied, in giving judgment, was the general effect of the whole, and he expressly overrules the case of *Edwards v. Alliston* (b), before Sir *John Leach*. But I do not think that *Doe d. Clift v. Birkhead* governs this case beyond this:—that the principle is, that you must discover the intention from the whole will, and there was sufficient in that will to shew that the word “share,” which was there used, embraced accruing as well as original shares.

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I am of opinion on this will, that no such intention can be discovered. It did not enter into the testator's mind; all he thought was, that the property was to be divided into four parts, and that when one died his share was to go to the others, and it did not enter into his consideration, that after the death of the first, there would, on the death of the second, be something more to provide for, namely, the accrued portion. In that view of the case, I must hold that they took by survivorship the original, but not the accrued shares.

(a) 4 *Exch.* 110.

(b) 4 *Russ.* 78.

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THE UNITY JOINT-STOCK MUTUAL BANK-
ING ASSOCIATION v. KING.

Jan. 22, 23,
30.

A father, the equitable owner of a small bit of land, erected a granary thereon; he afterwards allowed his two sons to use and occupy them, and they erected other buildings thereon at a great expense. Held, under the circumstances stated by the father in his answer, that the sons had a lien on the premises for their outlay.

Two sons had, as against their father, a lien on his estate, for an outlay made thereon by them; on the other hand, the father had a claim against the sons in respect of a suretyship entered into by him for them. Held, that these demands might be set off in equity.

ON the 31st *December*, 1853, *James King*, the father of *Octavius* and *Alfred King*, entered into a contract with a railway company for the purchase for 50*l.* of a piece of land at *Dullingham*. The money was not paid, nor was the contract completed, but the purchaser was let into possession as owner of the land, and he built a granary upon it at an expense of about 280*l.* In *May*, 1855, he put his sons in possession of the land and buildings, and they afterwards erected two other granaries and a coal-shed on the land, at an expense of 1,200*l.*

In *January*, 1856, *James King* became surety for his sons, to Messrs. *Harvey* and *Hudson*, for the sum of 10,000*l.*, and in consequence of the subsequent bankruptcy of his sons, in *October* following, he was called on to pay it.

In *September*, 1856, *Octavius King* by some means or other, obtained possession of the contract of the 31st of *December*, 1853, and he deposited it with the Plaintiffs (a joint-stock banking company) as a security for the payment of whatever balance was then or might thereafter become due to the Plaintiffs from him and his brother.

On the 22nd of *October*, 1856, *Octavius* and *Alfred King* became bankrupt, and at that time, 3,000*l.* was due from them to the Plaintiffs, who by this suit claimed to be entitled to the amount as equitable mortgagees of the

the property, by virtue of the deposit. Their right depended principally upon the circumstances under which the sons were allowed to have possession of the property and make lasting improvements thereon, and upon the circumstances under which the agreement was deposited with the Plaintiffs. These appeared from the evidence to be as follows :—

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As to the manner in which *James King* allowed his sons to take possession, the Court relied wholly on the statements made by *James King* in his answer, which were as follows :—

“ In *May*, 1855, two of my sons, *Octavius* and *Alfred King*, entered into partnership together, in a business which chiefly consisted of buying and selling corn. Shortly afterwards, *I allowed them the use and occupation* of my granary and the land and premises so purchased by me of the railway company, for the purposes of their partnership business ; and although I contemplated and intended, at some future time, to make over the said land and hereditaments to them, yet I never in fact did so, nor did I ever engage or promise to do so ; and I allowed my said sons the use or occupation of the said premises, without binding or placing myself under any obligation to allow them to continue such use and occupation, and without any arrangement as to the terms on which they should hold the same ; but the whole transaction was a matter of mutual confidence between us, and subject to future arrangement. However, I distinctly say, I never made over or relinquished, and never engaged to make over or relinquish, to my sons the property in the land and hereditaments, but reserved and intended to reserve the same in my own hands and power, until I should think fit otherwise to deal therewith ; and I deny that I allowed my sons

or

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or either of them to deal herewith as their or either of their own absolute property, or (save as aforesaid) that I allowed them to enter into or remain in possession thereof. I admit, as already stated, that my sons *Octavius King* and *Alfred King* caused to be erected and built, upon the piece of land, in or about the month of *July* and *August*, 1855, two other granaries; and in or about the months of *May* and *June*, 1856, a coal-shed and a dwelling-house, and that the cost thereof, which amounted to about 1,200*l.*, was paid by my sons *Octavius King* and *Alfred King*; but I say, that the charges for building the three granaries, coal-shed and dwelling-house, were all made out and included in one or more bills, and charged to me, and I was the person on whose credit the whole were built; but the charges for building the said two granaries, shed and house were, in fact, paid by my said sons, who also supplied me with goods to the extent of 249*l.* 13*s.* 7*d.* in respect of my outlay in building the granary first erected."

The circumstances relating to the deposit were as follows :—

On the 19th *August*, 1856, an application was made to the Plaintiffs by *Octavius King* by letter, asking the bank to discount bills to the amount of 2,500*l.* on the mortgage of these premises. In this letter he said—
 "I should feel obliged if you would inform us, per return of post, if we lodged with you the writings of premises, on which we have expended 2,500*l.*, you would discount bills to that amount on that security."
 The manager of the bank said, that he asked the sons to call upon him, but before they did so, he received a further letter saying :—"I am unable to get to town this day, but hope to do so on Monday. The matter
 of


of my last I again refer you to, viz., if I deposit with you the deed of three granaries, one coal-shed, and a house (all freehold) situated at *Dullingham* near the rail, on which there has been expended 3,500*l.*, if you would discount bills for us to the extent of 2,500*l.*”

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The manager further said:—On the 15th of *September Octavius King* called on me at the Unity Bank, and on behalf of himself and his brother *Alfred King*, he handed over to me a certain agreement in writing, bearing date the 31st day of *December*, 1853, and made between the *Newmarket* Railway Company. *Octavius King* then stated to me, in answer to my inquiries on the subject of the agreement, that his father had paid the railway company 50*l.*, and had given all his interest in the piece of land to himself and his brother *Alfred King*, towards advancing their said partnership business, and that they, (meaning the firm of *Octavius* and *Alfred King*,) had erected buildings on the piece of land for the purposes of their business, which, together with the land, he stated to me were of the value of 3,000*l.* I however required *Octavius King* to procure his father to sign a memorandum on the agreement, in confirmation of his having so given them (*Octavius King* and *Alfred King*) all benefit of the agreement, and I returned the agreement to *Octavius King* for such last purpose.” It appeared from the evidence, that a few days afterwards, *Octavius King* brought back the agreement, with a forged signature of his father, above which he said he might write any agreement he thought fit, for answering his purpose in advancing the money. The manager expressly said, that upon seeing that signature, he believed it to be the genuine signature of the father, *James King*.

He proceeded—“That I had great confidence, at
 that

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that time, in the representations made to me by *Octavius King*, who told me his father would execute it when required; and I thereupon accepted the deposit of the said agreement, as a security for the payment of whatever balance was then or might, at any time thereafter, be due to the Plaintiffs on the cash credit account opened by them with *Octavius* and *Alfred King*; and *Octavius King*, on behalf of himself and his brother *Alfred King*, accordingly deposited the agreement with me for the purposes last aforesaid, and for no other purpose, and upon the understanding also, that the same was to be duly assigned to the Plaintiffs in manner and for the purpose last aforesaid."

Mr. *R. Palmer* and Mr. *W. W. Cooper*, for the Plaintiffs, argued, first, that, by arrangement between the father and sons, the land originally of the value of 50*l.* only, had become the property of the sons, who had paid a consideration for it, and had made it valuable by means of their outlay; secondly, that for this outlay, at all events, they had a lien on the property, their father having stood by and sanctioned the expenditure; thirdly, that the father had, in fact, concurred in the equitable deposit. They cited *Short v. Taylor* (a); *Williams v. Earl of Jersey* (b); *Surcome v. Pinniger* (c); *Stanton v. Percival* (d).

Mr. *Baggalay* for the Assignees.

Mr. *Selwyn* and Mr. *Hardy*, for the father's trustees, argued, that there being no contract in writing, the Statute of Frauds prevented the sons acquiring the property; secondly, that the agreement had been im-

properly

(a) 2 *Eq. Ca. Ab.* 522.
 (b) *Craig & P.* 91.

(c) 3 *De G., M. & G.* 571.
 (d) 5 *H. L. Ca.* 257.

properly obtained, and that a fraud had been committed on the father; thirdly, that there was no lien for the outlay made; fourthly, that the father was entitled to set off his claims under the suretyship against any lien on the property. They cited *Lord Cawdor v. Lewis* (a); *Statute of Frauds* (b); *Sutherland v. Briggs* (c); *The East India Company v. Vincent* (d).

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Mr. R. Palmer in reply.

The MASTER of the ROLLS.—I will read the evidence.

The MASTER of the ROLLS.

This is a suit by Plaintiffs, claiming to be entitled to a mortgage for their advances to two persons of the name of *Octavius* and *Alfred King*, who carried on business together as corn merchants, on some land which was in their occupation at the time when the alleged mortgage was made. The manner in which the father put them into possession I will take from his own statement contained in his answer.

Jan. 30.

He says, "In *May*, 1855," &c.—[*See ante*, p. 73.]

That being so, the first question is, what, in that state of circumstances, were the rights of these parties as between themselves. Upon the statement of the father, I am of opinion that he could not have taken possession of that land again, without allowing to his sons the amount of the money they had laid out upon it. Without therefore coming to the conclusion, which, upon

(a) 1 Y. & C. (Exc.) 427.
(b) 29 Car. 2, c. 3.

(c) 1 Hare, 26.
(d) 2 Atk. 83.

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upon the evidence, I have not come to, that he had intended to make or that he had made over to his sons his interest in the property, I am of opinion that the money laid out by the sons was a lien and charge upon it, as against the father. I am confirmed in that view by the circumstances stated in the passage I have just read, that goods to the value of 249*l.* 13*s.* 7*d.* were furnished to him by his sons, which he was not to pay for, but which were to be taken by him as a remuneration for the amount of the money which he had laid out in building the granary. I think, therefore, that both this sum of 249*l.* 13*s.* 7*d.* and the sums laid out by the sons upon the land, were a charge upon the land; and I am of opinion, if no other transaction had taken place between the father and sons, and if the father, or any person claiming through him, now insisted that he was entitled to the land, that this Court would not allow it to be taken away from the sons, without paying them these sums. The 1,200*l.* was not a debt due to them, because it was not a debt of the father's, for, although he says the charges for the granary, &c. were made out and charged to him, he expressly says that the charges for building were paid by the sons. I am of opinion, therefore, that there is a charge in favour of the sons.

That being so, the next question to answer is, the mode in which the sons dealt with this property as regards the Plaintiffs. I say "the sons," because, although in point of fact *Octavius* alone dealt with the bank, yet he acted on behalf of himself and his brother, with whom he was in partnership, and there is no allegation and no question raised in the cause that such acting was not within the scope of his authority as partner, or that the partners did not have the benefit of the advance made by the bank.

What

What took place with the bank was this:—[*His Honor stated the circumstances, see ante, p. 74*].

Now this proceeding did not, in the slightest degree, affect the father, but the question is, how far did it affect the sons? If the sons were the owners of the land, this was clearly an equitable deposit for valuable consideration, to secure to the bank the amount of the advance made to the sons; and I am of opinion that it is not possible for the sons, upon this state of the evidence, to say, that it is not a security for the payment of the amount of their interest in the land, whatever that interest was. Any false representations made by them with respect to the father's having no interest in the land, or with respect to the fact that he was a concurring party in the transaction, and that he would be ready to sign the agreement, however inoperative against the father, cannot in the slightest degree affect the interest of the sons. It follows therefore, that the interest of the sons was duly mortgaged by the deposit of this instrument to the bankers.

That being so, the case would be at an end if it were not for this, which the father states in his answer. He says—"In the month of *January*, 1856, I became surety for my sons in the sum of 10,000*l.* to Messrs. *Harvey* and *Hudson*, and I say that, in consequence of the bankruptcy of my sons, Messrs. *Harvey* and *Hudson* required me to pay them the sum of 10,000*l.* for which I had become surety to them." The question is, what are the rights of the parties, arising from this transaction? If the sons had not parted with their interest in the land, I should be clearly of opinion that, as against them, the father would be entitled to set off any sum which he had paid on that account, against any sum due to them upon the security of this land,
and

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and that this Court would enforce such right, and cause them to deliver up the land free from any charge upon it: but in my opinion, the case is very different as regards the bankers. At the time the deposit was made with them, nothing whatever was due to the father. They were purchasers for value of the interest of the sons to the extent of their advances, without any notice whatever, and as the right of set-off did not arise until a subsequent period, it cannot now be enforced against the bankers. If I had to declare the right of the father to the land, I see nothing to disentitle him to it: but it must be subject to the charge upon it, which, according to his own statement, existed in favour of the sons.

I must therefore make a declaration to the effect, that the sons had a charge or lien upon the property for the amount which they had laid out and for the 249*l.* 13*s.* 7*d.*, the value of the goods supplied to the father for and on account of his expenses in building the granary, and that they had this lien in the months of *August* and *September*, 1857. I must then declare, that the interest of *Octavius* and *Alfred King* in these hereditaments was in equity, by reason of the deposit of the agreement of the 31st of *December*, 1853, with the Plaintiffs, charged with the amount due to the Plaintiffs in respect of their advances.

With respect to the costs, it is clear that the suit is framed for the purpose of making the father liable, and the whole scope and object of the bill is to declare that he was a participating party in the lien, and upon the evidence I think the Plaintiffs are only entitled to the decree which I have mentioned. I cannot, in that state of things, give the Plaintiffs the costs of the
 suit

suit as against the father or the persons claiming under him, but they may have their costs as against the sons.

There will therefore be a double foreclosure decree, first against the sons, and then as against the person claiming under the father.

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EVANS v. EVANS.

29 Jan.
9 Feb.

THE testator *Edward Evans*, by his will, dated in September, 1830, expressed himself in the following terms :—

“ All my estate, messuages, lands and hereditaments situated at *Hoarwithy*, in the parish of *Hentland*, in the said county of *Hereford*, and all other my estates that I am now or may hereafter be possessed of, unto my dear wife, *Ann Evans* and her assigns, for and during the term of her natural life. And I do will, order and direct my wife *Ann Evans*, at her convenience, to sell and dispose of all that my said estate situated at *Hoarwithy*, in the said parish of *Hentland*, and county of *Hereford*, and to place out at interest, on real or government security, the principal sum of money that may arise from such sale; and it is my will and direction, that the annual interest be the property and at the sole disposal

Survivorship as to a class, in a gift after the death of the tenant for life, referred to the death of the testator and not to the death of the tenant for life. Gift to *A.* for life, and after her decease, to “ the surviving children of *B.* and *C.*, except the youngest son of *B.*,” who was to have 30*l.* to his share more than the others. The will proceeded, of “ should either of the said

children die having no issue, his or her share to be then equally divided amongst the survivors.” Held, that the children of *B* and *C.* took vested interests, at the death of the testator, in remainder expectant on the decease of *A.*, with a gift to the survivors in the event of any one dying without issue in that interval.

The word “ *share* ” alone, when there is no gift over of the whole fund, in case of the failure of all the members of the class, is not sufficient to carry over an accrued share.

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of my wife *Ann Evans*, for and during the term of her natural life; and from and after her decease, I hereby give, devise and bequeath the principal sum of money and interest arising from the said sale of my before-mentioned estate, as hereinafter described, that is to say: the one-third part of the money arising from such sale, to my wife *Ann Evans*, her heirs and assigns for ever, the remaining two-thirds of the money arising from such sale I give and bequeath to be equally divided, share and share, between *the surviving children* legally begotten of my two brothers, *George Evans* and *Richard Evans*, except the youngest son of the said *George Evans*, who I will and direct is to have and be entitled to thirty pounds of good and lawful money to his share more than either of the other children of my said brothers. *Should either of the said children die having (a) no issue*, his or her share to be then equally divided among the survivors.

The testator died in *April*, 1831, and his widow died in *August*, 1856.

It appeared that at the date of his will, and at his death, there were three children of his brother *George* living, viz., *John*, *George* and *Ann*. Of these *John* died without issue in 1837, in the lifetime of the widow; *George*, who survived the widow, died in *November*, 1856, having had issue but leaving none, and *Ann* died in 1849, leaving issue.

At the date of the will, and at the death of the testator, his brother *Richard* had four children—*Mary*, *Harriet*, *Charlotte* and *Emma*. Of these *Mary* and *Harriet* died in the life of the widow leaving issue; *Charlotte* had also died in 1846, in the life of the widow, without issue, and *Emma* was still living.

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(a) Sic in probate, but "leaving" in the will.

The only children therefore who had no issue were *John* and *Charlotte*, of whom *Charlotte* survived *John*.

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Mr. *Follett* for the Plaintiff.

Mr. *Lloyd* for the legal personal representatives of *George*; *Crowder v. Stone* (a).

Mr. *Haddon*, for *Samuel Hicks*, *Thomas Morris* and *William Charles* (administrators) and *Emma Evans*, cited, as to the period to which the survivorship was to be referred, *Jarman on Wills* (b); *Weedon v. Fell* (c); *Ive v. King* (d); and as to reading "survivors" as "others" *Jarman on Wills* (e); *Aiton v. Brooks* (f).

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

This is a question on the construction of the will of *Edward Evans*. The question is, what signification is to be put on the words "surviving children," and at what period are they to be ascertained, that is, whether it means those who survived the testator, or those who survived the tenant for life.

Feb. 4.

The words of the will are these:—[see *ante*, p. 81.] There can be no question of the establishment of the rule first laid down in the case of *Cripps v. Wolcott* (g), viz. that, where an estate is given to *A.* for life, with a direction that, after the death of *A.*, it is to be divided between

(a) 3 *Russ.* 217.

(b) *Vol.* 2, p. 616 (2nd ed.)

(c) 2 *Atk.* 123.

(d) 16 *Beav.* 46.

(e) *Vol.* 2, p. 585 (2nd ed.)

(f) 7 *Simons*, 204.

(g) 4 *Mad.* 11.

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between certain named persons or a class of persons and the survivors or survivor of them, the period of survivorship is to be referred to the death of the tenant for life. But it is also equally plain, that the presumption of survivorship being referrible to this period may be repelled by clear expressions contained in the will, shewing that the testator referred the survivorships to some other period, and I think that such expressions are to be found in the will before me. In the first place, it is to be observed that the testator desires that the youngest son of *George* is to have 30*l.* more than the others; this seems to me to point to a particular person, and to shew that the youngest son of *George* then alive was a peculiar object of his bounty. It was no doubt possible, that the death of that son and the birth of another might frustrate his wishes, but I rather look at it as shewing that he considered that the persons who were to take were ascertained at the time when he made his will, provided that those persons survived him. This, however, taken by itself, would certainly not be sufficient to induce me to depart from the rule in *Cripps v. Wolcott* (a), but it is an indication to some extent confirmatory of what is in the subsequent part of the will more plainly expressed.

The expressions which appear to me to take this case out of that rule are the following, viz., he says:—“Should either of the said children die having no issue, his or her share to be equally divided among the survivors.” Now, unless I strike those words entirely out of the will, I can give them no meaning that will not repel the application of the rule laid down in *Cripps v. Wolcott*, that the period of survivorship is to be referred to the death of the tenant for life. To what period of

(a) 4 *Mad.* 11.

of time, if I give those words any meaning, does the dying without issue refer? it must be, of course, after the death of the testator, and being so, it must either be before or after the death of the tenant for life. It is admitted, and indeed it could not be disputed, that those words do not mean, that if any one of the children of *George* and *Richard* who survived the tenant for life should after that period die without issue, in that case the share of the one so dying was to be divided between the others. It is admitted that the shares must at latest be indefeasibly vested on the death of the tenant for life; but if this be so, and undoubtedly, consistently with settled rules and principles, it cannot be otherwise, then the period to which this sentence refers must be to a dying without issue before the death of the tenant for life. The testator then directs, that in case either of the children of *George* and *Richard* should die having no issue after his death, and during the life of the tenant for life, the share of that child shall go to the survivors. But what is to take place if a child die leaving issue during that period? *Expressio unius est exclusio alterius*: in that event, the share of the child dying leaving issue is not to go over. It follows then, that a child who survives the testator and who dies before the tenant for life, leaving children, takes a share which does not pass away from him. How can this be reconciled with the construction, that no child takes a share unless he survive the tenant for life?

I have always strongly supported the rule in *Cripps v. Wolcott* (a), which is conformable to reason and common sense, but a testator is not bound to adopt that mode of disposing of his property, and if he express

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a different intention, the Court must carry that intention into effect.

It remains to consider whether the decided cases conflict with or impugn the construction I am about to put on this will. I have examined them carefully, and I find nothing that could bind me to such a conclusion: on the contrary, they seem to me strongly to support it. Thus in *Weeden v. Fell* (a) a testator gave a legacy to his widow for her life and, after her death, directed it to be divided amongst his four children, share and share alike, and to the survivors, but not before they attained the age of twenty-one or the days of marriage; for his intent was, that if any of his four children should die before twenty-one or days of marriage, then his, her or their share so dying should go and be divided amongst the survivors. One child, who attained twenty-one and predeceased his mother, took a share. The case is exactly analogous to the present if the words "*without leaving issue*" are substituted for "*before twenty-one or day of marriage*."

The case of *Bouverie v. Bouverie* (b) is a strong confirmation of the view I take of this will. In that case, the words were these:—"I give to my daughter *Katherine Bouverie* the interest of all I have in the Stocks, for her sole use, and at her death I give the Stock to her children, to be equally divided between them, together with the interest, to be laid out for their use, in case their mother dies before they arrive at the age of twenty-one. In case one dies, then the others are to have share and share alike, the survivor to have the whole: should they all die before the age of twenty-one, I then give the said Stock to my five nieces and my nephew, equally

(a) 2 *Atk.* 123.(b) 2 *Phill.* 349.

equally to be divided between them." The Lord Chancellor, on appeal, held, that the shares of the children were vested on the death of the testator, liable to be divested in case they died under twenty-one in the lifetime of the mother, and that the representatives of the children of *Mrs. Bouverie*, who died in her lifetime after having attained twenty-one, were not excluded from a participation in the fund to be divided on the death of the mother: the opening passage of Lord *Cottenham's* judgment is applicable to the case before me. He says,—“the Court adopts the rule of including as many objects of the gift as possible, consistently with the declared purpose of the testator.” (a)

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Both these cases confirm the view I have expressed to be apparent on the words used, viz., that the expressions used by the testator import a gift to a class to be ascertained at his own death, with a direction, that if any one or more of that class should die before the period of distribution, without leaving issue, his share is to be divided amongst the remaining and then surviving members of that class.

I think, therefore, that the children of *George* and *Richard* who survived the testator took vested interests in remainder in the two-thirds, expectant on the decease of the widow, with a direction, that in the event of any one dying without issue in that interval and before the period of distribution, the share of the one so dying was to be divided amongst those who survived.

This undoubtedly, in the present case, removes the question of what is to be done with accrued shares, as two of the children in question died before the tenant for life without issue. But my opinion, as I expressed it

(a) 2 *Phil.* 351.

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it in a late case (a), is, that the word "*share*" alone, where there is no gift over of the whole fund, in case of the failure of all the members of the class, as in the case of *Douglas v. Andrews* (b), is not sufficient to carry over the accrued share, and that consequently the half of the share of *John* which went to *Charlotte*, who afterwards died without issue in the life of the widow, did not pass to the surviving children of *George* and *Richard*, but went to her legal personal representatives.

(a) *Goodwin v. Finluyson*, ante, p. 65.

(b) 14 *Beav.* 347.

8, 9, 10 Feb.

JOHNSON v. FESENMEYER.

Remarks on the doctrine of fraudulent preference.

If a trader, on the eve of bankruptcy, yielding to the *bond fide* pressure of a creditor, give him a security on part of his property, this is not a fraudulent preference, although both parties may be aware of the impending bankruptcy; but if the debtor, even on pres-

sure, assign the whole of his property to a creditor, so as to disable him from continuing to carry on his business, this is a fraudulent preference and invalid against the other creditors upon a bankruptcy. The same result follows, where an exception from the whole property assigned is merely colorable.

The case of *Stanger v. Wilkins*, 19 *Beav.* 626, explained.

A bill by assignees of a bankrupt prayed to set aside a mortgage executed to a creditor by a bankrupt on the eve of bankruptcy, as being "in fraud of his general body of creditors," and it also prayed general relief. The bill failing on the ground of fraud, Held, that the Plaintiffs were not entitled to a decree for redemption.

THE suit was instituted by the assignees of *Thomas Archbutt*, a bankrupt, against the Defendant *Fesenmeyer*, his former solicitor. The bill prayed, that an assignment, dated the 8th of *October*, 1855, and made between *Thomas Archbutt* of the one part, and the Defendant *John Frederick William Fesenmeyer* of the other part, might, "under the circumstances therein appearing, be declared to have been procured by the Defendant and executed by *Thomas Archbutt* in fraud of the general body of the creditors of *Thomas Archbutt*," and that the Defendant might be decreed to deliver up the same to be cancelled, and that the Plaintiffs might have "such further or other relief as the nature of the case might require."

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The circumstances were these :—*Fesenmeyer* was the solicitor of *Archbutt*, a timber merchant. In 1854, *Archbutt* was in very embarrassed circumstances and had compounded with his creditors, whose debts exceeded 5,800*l.*, for 12*s.* 6*d.* in the pound, but he made default in payment of the last instalment of 2*s.* 6*d.* *Fesenmeyer* had a claim against *Archbutt* for costs, and the latter, while his pressing necessities were still continuing, executed the indenture in question, dated the 8th of *October*, 1855, by which, after reciting the title of *Archbutt* to two leaseholds (No. 1, and No. 2, *Cranfield Villas*), and that he was indebted to *Fesenmeyer* “in respect of certain bills of costs, amounting together (after giving credit for all moneys received) to the sum of 466*l.* 15*s.* 2*d.*, which *Archbutt* had agreed to secure in manner thereafter mentioned,” *Archbutt* assigned the two leaseholds, being No. 1, and No. 2, *Cranfield Villas*, to *Fesenmeyer*, subject to an existing mortgage thereon, and to a provision for redemption on payment of the 466*l.* 15*s.* 2*d.*

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Meetings of the creditors took place, and on the 30th of *November*, 1855, *Archbutt*, acting under the advice of *Fesenmeyer*, filed a declaration of insolvency, under which he was adjudicated a bankrupt. His debts were very considerable, and his assets very small.

The bill was filed in *July*, 1856, by his assignees, praying as above stated.

Mr. *R. Palmer* and Mr. *E. B. Lovell*, for the Plaintiff, argued that the deed was a fraud on the general body of creditors, having been obtained by arrangement between an insolvent trader and his solicitor; *Stanger v. Wilkins* (a); 12 & 13 *Vict.* c. 106, s. 67.

Mr.

(a) 19 *Beav.* 626.

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Mr. Selwyn and Mr. Southgate for the Defendant,
 cited *Van Casteel v. Booker* (a); *Hall v. Allnutt* (b);
Strachan v. Barton (c).

Mr. Lovell in reply.

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I will read the evidence and dispose of the case finally to-morrow. But the general view I now take of the case is this :—As far as I have been able to attend to the evidence it does not entitle the Plaintiff to a decree.

It is not every species of transaction which gives a creditor a preference which is therefore wrong and void. The preference must be a fraudulent preference, and must be something which gives him that to which he would not be entitled otherwise. Of course I refer to those deeds and transactions for which there is a valuable consideration; for if there be no valuable consideration, it would be void under the statute of the 13 *Eliz.* c. 5.

Fraudulent preference is of two sorts; one is, when a man, on the eve of bankruptcy, knowing he is about to become bankrupt, of his own mere motion and will, sends to a creditor, informs him of the fact, and gives him some property, in order that the creditor may obtain something for himself over and above that which he can get by proving under the bankruptcy: that is a fraudulent preference. But it must proceed voluntarily from

(a) 2 *Exch. Rep.* 691.
 (b) 18 *C. B.* 505.

(c) 25 *L. J., Exch.* 182.

from the bankrupt himself, for if the creditor comes and insists on being paid or on having security, the fact of the debtor giving way and acceding to the request does not make it a fraudulent preference. That is very clearly and neatly put in the passage read to me from the judgment of the Barons of the Court of Exchequer.

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The amount of pressure is not a matter of very considerable importance, because, to make the transaction fraudulent, the preference must proceed voluntarily from the bankrupt himself, which it does not if he be induced to do it by the pressure of the creditor whether it be much or little.

The first class of cases is where a portion only of the property is disposed of; but there is another class to which I intended to refer in *Stanger v. Wilkins* (a), and which appears from my relying on that class of cases, which were cited for the Defendant on that occasion, viz. where a creditor goes to the debtor, and by using pressure, gets from him an assignment of every particle of property he has in the world, and thereby obtains the power of stopping his carrying on business at any moment he thinks fit. Whether this be done in contemplation of bankruptcy or not, I held that such a transaction, when it is followed by a bankruptcy, cannot stand as against the other creditors. It is called, in those cases, a fraudulent preference, but in point of fact, it is an assignment of the whole of the property of the debtor, so as to put it out of his power to carry on business. The transaction may be colorable, as in *Stanger v. Wilkins*, which I thought one of that description. There a
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(a) 19 *Beav.* 626.

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man, carrying on business as a butcher, assigned to a creditor a valuable lease in one place and a valuable property in another, and every particle of his furniture and stock in trade, in fact everything which enabled him to carry on his business. The only thing not assigned were some book debts, which did not appear to be of much value, and a balance at the bankers which amounted to 18*l.*, the rest of the property being worth 1,400*l.* or 1,500*l.* I thought that was not the case of an assignment of a portion of his property to secure a debt, but one in which the debtor had put himself entirely in the power of the creditor, who was enabled to stop his business at any moment, and who in fact had swept away the whole of the property for his own benefit. That case was afterwards compromised, by dividing the property, certainly a very equitable arrangement, for if the security had been confined to either of those properties, it would have been, in the view I take of the case, impossible to set it aside.

In this case, I cannot see anything to satisfy me that it was voluntary. The letters shew that *Fessenmeyer* was insisting that *Archbutt* should pay or secure the amount due to him.

If, in point of fact, he had assigned all his stock in trade and everything by which he could carry on business, and which would have rendered it impossible to carry on business except at the mere will and pleasure of the assignee of the property, the case might have been different.

I will however reserve my opinion until I have looked at the evidence more carefully.

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Upon a perusal of the evidence, I find it confirms the view which I stated yesterday. If a man is insolvent, and disposes of a portion of his property in favour of a *bonâ fide* creditor, although upon the eve of bankruptcy, and although this fact be known or believed by both parties, it may be a perfectly valid and legal transaction. To render it invalid, there must be a disposition on the part of the insolvent to favour that particular creditor, and this is generally shewn by the fact, that the first step or proposal towards the disposal of the property in favour of that creditor proceeds from the insolvent debtor. But if the creditor, although he knows that the debtor is insolvent, presses and insists upon having a security for his debt, and the debtor yield to that pressure, and give the security, although it may be well known to both, at the same time, that the effect will be to give to that particular creditor an advantage over the other creditors of the insolvent, the transaction, in my opinion, is perfectly good and valid. I wish to state it quite broadly, in order that, if the matter goes further, the grounds upon which I proceed may be fully understood.

The question, in some of the cases of this description, is one of fact, namely, whether, in truth, the security was given from the *bonâ fide* pressure of the creditor, or voluntarily by the insolvent. These cases have been usually settled by a jury, and very often give rise to a nice question.

In this case, I am satisfied that the security arose from the pressure of the creditor. In one instance the pressure appears to have been resisted by the debtor; but if however the assignment arose from the creditor insisting

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insisting on being paid, and the debtor seeing it would be useless to attempt to resist, and believing that the threat of the creditor would be put in execution, and to avert this took the steps required, that, in my opinion, is quite sufficient to make it a *bonâ fide* transaction; there is not sufficient, in these cases, to invalidate the security, unless it be shewn that it originated from the mere will and disposition of the insolvent himself.

In this case, there are various circumstances which convince me that it was produced by pressure. In the first place, there are several letters, in which the Defendant asks what is to be done "with my bill of costs," "with my security." When the two houses in *Cranfield Villas* were proposed to be mortgaged, the bankrupt *Archbutt* resisted it for some time, and then afterwards acquiesced in its being done. The circumstance of the deed not being shewn to him before execution, I do not consider to be of the slightest moment. He acquiesced in that, which appears to have been a *bonâ fide* pressure on the part of the Defendant. It is quite clear, I admit, that the Defendant knew that *Archbutt* was insolvent, he knew he was unable to meet his engagements; but if this is to invalidate a transaction of this description, there are very few cases where a security is obtained from a man in difficulties which could stand, because, in fact, when a man is in perfectly good credit, and is supposed to be in no difficulties, the creditors are very indifferent about the matter: it is the first creditor who hears that he is in difficulties that immediately applies for security. The result would be, that if the fact of his being insolvent at that time, and of this being known to the creditor at the time he obtains a security, were sufficient to invalidate the transaction, it would raise a question of great difficulty, which I
have

have never found raised, and the question would depend not merely upon whether the debtor was at the time insolvent, and whether that fact was ever known to the creditor, but also whether he was acquainted with such facts as to put him necessarily upon an inquiry, which would have led to a knowledge of the insolvency. I certainly did not mean to lay down any such principle as that in *Stanger v. Wilkins* (a). In that case, I proceeded upon this principle: that a creditor, who, knowing that a debtor is insolvent, takes from him an assignment of all his property, in such a manner as to enable the creditor to stop the business of the debtor at any time he please, and absolutely to leave nothing for his other creditors, cannot keep that security against the other creditors. That is a question wholly distinct from an assignment of part of the property which could not have any such effect. *Stanger v. Wilkins* was certainly not a clear case. It depended upon this:—whether the exception of portions of the property of the debtor, namely, the book debts and the balance at the bankers, were merely colorable exceptions. I was of opinion in that case, that the book debts were not shewn to be worth anything, that the small balance at the bankers was a mere colorable exception, and that in substance, the whole of the property was taken, and taken in such a way as to enable the creditor at any moment to stop the business of the debtor, and to abstract the whole of the property from the rest of the creditors. This was the point argued on that occasion, and for which the authorities were cited on which I commented. They were all cases in which a jury had determined that the transaction was not fraudulent, and it appeared before the jury that although the stock in trade of the business was taken, which no doubt made an important

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important item in the consideration of the matter, yet there was a considerable portion of the property not taken.

That case was appealed from and compromised, but if my decision had been reversed, it would not have altered the principle upon which I proceeded, because it would only have shewn that the Court of Appeal had come to a different conclusion upon the evidence in that case. The principle of the case is to be found in the books, and is referred to in the two cases cited before the Common Pleas.

In the case now before me, I was desirous to look at the evidence, and to see what portion of the property was taken, and I am clear upon the evidence, that nothing like the whole of the property of *Archbutt* was taken; that a large portion was left, and amongst it that portion of the property which it was most important to him to retain, namely, the stock in trade employed by him in carrying on his business. Therefore it did not necessarily follow that the effect of giving the security would be such, as to lead to the immediate total insolvency of the debtor.

Having looked at the evidence, I have come to the conclusion, that this security is not to be impeached, and that the bill must be dismissed with costs.

Mr. R. Palmer.—The Court will make the usual decree for redemption.

The MASTER of the ROLLS.—No; the bill does not pray that, the Plaintiff has put his case quite on another ground.

NOTE.—Affirmed by Lord *Chelmsford*, L. C., 21 July, 1858.

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GROSVENOR v. DURSTON.

BY his will, the testator gave the residue of his real and personal estate to his widow *Martha Durston*.

The testator made a codicil, dated the 20th of August, 1833, and which was as follows:—

“Whereas I duly made and published my last will and testament on the 22nd day of *February*, 1832, and being desirous to alter the same, so far as relates to my leasehold premises situate in *Durham Mews, Chelsea*, and the distribution of my moneys in the funds or securities for money by government, I do hereby declare this to be a codicil to my said will, and that the same may be taken as part thereof, namely, that it is my will, that in case my dear wife *Martha Durston* shall be minded or desirous for my trustee, in the said will named, to sell and dispose of all my interest in such leasehold premises, it shall be competent for him so to do, my said trustee investing the purchase-money in the funds or government securities, the interest whereof is to be made payable to my said wife during her life, or widowhood. And it is my further will, that the principal money arising from such sale and the moneys to arise from my present funded Stock or government securities, from and after the decease of my wife, shall be divisible and disposable as follows: one third part or share thereof to be at the absolute disposition of my said wife, and the remaining two-thirds to be divisible and go to my two brothers.”

Feb. 10.

A testator, whose only funded property consisted of a sum of Long Annuities, which had been purchased by him in the joint names of himself and wife, bequeathed to his brothers an interest in “his present funded Stock or government securities.” He also made a provision for his wife. Held, that the wife was put to her election in regard to the Long Annuities.

A share in Long Annuities held, upon the context, to pass under the words “remaining sum or sums of money.”

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The testator died in 1833. There was standing in the joint names of the testator and his wife 66*l.* *per annum* Government Long Annuities, which had been purchased by him out of his own moneys, and transferred into the joint names of himself and his wife. He was not possessed of or entitled to any other funded or government securities.

Martha Durston died in 1857, and the Plaintiff was her residuary legatee. The Plaintiff now insisted, that the purchase of the 66*l.* *per annum* Long Annuities, by the testator, in the joint names of himself and wife, had been made by way of advancement or provision for her, and that she was not put to her election by the terms of the will of the testator; and she insisted, that the 66*l.* *per annum* Long Annuities, or some part thereof, belonged to and formed part of the estate of the widow.

Mr. *F. White*, for the Plaintiff, argued that the testator only intended to dispose of what was his own, and not that in which his wife was interested. *Douglas v. Douglas* (a); *Doe d. York v. Walker* (b); *Lady Langdale v. Briggs* (c); *Dummer v. Pitcher* (d); *Cole v. Scott* (e); *Jarman on Wills* (f), were cited.

Mr. *J. J. Jervis*, *contra*.

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The words "my present funded Stock" distinctly point to property which the testator then possessed,
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| (a) <i>Kay</i> , 405. | (d) 2 <i>Myl. & K.</i> 262. |
| (b) 12 <i>Mee & W.</i> 591. | (e) 1 <i>Mac. & Gor.</i> 518. |
| (c) 3 <i>Smale & G.</i> 246, and 26 | (f) <i>Vol.</i> 1, p. 379. |
| <i>L. J. (Ch.)</i> 27. | |

and there being no other funded Stock to answer the description, it must apply to that which he had bought out of his own moneys in the joint names of himself and wife.

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The widow is therefore put to her election.

Another question arose on the will of the widow *Martha Durston*, which was to the following effect :—

“ I direct that all my just debts and funeral charges, together with the expenses attending the settlement of my affairs, be paid *out of the money in my possession* or am entitled to at the time of my decease. I direct that my furniture and other effects may be sold.” She then appointed an executor, and bequeathed three legacies of 10*l.* each and her clothes, and proceeded in these terms :—“ After all my debts, funeral charges, bequests and other expenses have been paid, then I give the *remaining sum or sums of money* unto my dear friend *Sarah Grosvenor*” (the Plaintiff).

The question was whether the one-third of the Long Annuities passed by this will to the Plaintiff.

Mr. *F. White* cited *Dowson v. Gaskoin* (a).

Mr. *J. J. Jervis* for the Defendant.

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The expression, “remaining sum of money,” is a general description. Therefore declare that the Plaintiff is entitled to the one-third of the Long Annuities.

(a) 2 *Keen*, 14.



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Jan. 21.
Feb. 12.

A leasehold for lives, limited to one and his heirs, was devised to trustees, in trust for A. and his heirs. A. died intestate and without heirs. Held, that the leaseholds *pur autre vie*, passed, under the 6th section of the Wills Act, to A.'s administrator, and did not belong to the trustees.

REYNOLDS v. WRIGHT.

THE testatrix *Elizabeth Shepherd* was absolute owner of certain fee simple estates in *Sunderland*, and was absolutely entitled, at her decease, to the freehold lease of a farm and land called *Hollikersides*, held by her under a lease from the Bishop of *Durham*, dated the 27th of *September*, 1832, whereby the same premises were granted and demised to her, *Elizabeth Shepherd*, her heirs and assigns, for the lives of the three persons in the lease named (who were all now living) and the life of the longest liver of them, at the yearly rent of 14s.

Elizabeth Shepherd by her will, dated the 27th of *February*, 1844, devised and appointed all the real estate, whether freehold, copyhold, leasehold for lives or years, or of whatever tenure the same might be, which she was seised or possessed of or entitled to unto and to the use of the Defendants *Joseph J. Wright* and *George W. Wright*, their heirs, sequels in right, executors; administrators and assigns, for ever, according to the different tenures or natures thereof respectively, in trust for *John Samuel Barron*, his heirs, sequels in right, executors, administrators and assigns for ever; and the testatrix appointed the last-named Defendants her executors.

The testatrix died on the 7th of *August*, 1844, and her funeral and testamentary expenses and all her debts had been paid.

John Samuel Barron entered into possession, but he died intestate in *November*, 1856, and without having been

been married. He left no heir (being illegitimate), and on the 9th of *March*, 1857, letters of administration of the goods, &c. of *John Samuel Barron* were (on the nomination of her Majesty) granted to the Plaintiff, the Solicitor for the affairs of her Majesty's Treasury, by the Prerogative Court.

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The Plaintiff, as administrator of *John Samuel Barron*, claimed to be entitled, in equity, to the residue of the lease of the property at *Hollikersides*. On the other hand, the Defendants *Joseph John Wright* and *George Walton Wright* claimed to be entitled to hold and retain the farm and land called *Hollikersides*, for the residue of the freehold lease thereof then vested in them, for their own benefit, discharged from the trusts formerly subsisting therein in favour of *John Samuel Barron*, deceased; and they brought an action of ejectment to recover possession. The Plaintiff then filed this bill to restrain the action, and the Defendant having demurred to the bill, the question of title now arose on argument of the demurrer.

Mr. *R. Palmer* and Mr. *Hadden*, in support of the demurrer, relied on *Burgess v. Wheate* (a); *Atkinson v. Baker* (b); *Wall v. Byrne* (c); *Ripley v. Waterworth* (d); 3 *Bac. Abr.* 186-188, *tit.* "Estate for Life and Occupancy;" *Low v. Burron* (e); *Campbell v. Sandys* (f); 3 *Wm. & Mary*, c. 14; 14 *Geo.* 2, c. 20, s. 9; 1 *Vict.* c. 26, s. 6; *Jones v. Goodchild* (g); *Westfaling v. Westfaling* (h); *Duke of Devon v. Atkins* (i); *Carpenter v. Dunsmure* (k); *Doe d. Timmis v. Steele* (l).

Mr.

- (a) 1 *Eden*, 177.
- (b) 4 *Term Rep.* 229.
- (c) 2 *Jo. & Lat.* 118.
- (d) 7 *Ves.* 425.
- (e) 3 *P. Wms.* 262.
- (f) 1 *Sch. & Lef.* 281.

- (g) 3 *P. Wms.* 32.
- (h) 3 *Atk.* 460.
- (i) 2 *P. Wms.* 381.
- (k) 3 *El. & B.* 918.
- (l) 4 *Q. B.* 663.

1858. Mr. *Wickens*, for the Plaintiff, cited *Atkinson v. Baker* (a); *Carpenter v. Dunsmure* (b); *Doe d. Lewis v. Lewis* (c).
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Mr. *R. Palmer* in reply.

The MASTER of the ROLLS:—I will consider the case.

The MASTER of the ROLLS.

12 Feb. The case is this :—The testatrix, *Elizabeth Shepherd*, was lessee of lands granted to her and her heirs and assigns for the lives of three persons and the life of the survivor. She made her will leaving this property to two trustees, in trust for *John Samuel Barron*, his heirs and assigns, and died leaving the trustees and *Barron* surviving. *Barron* died without a will and without any heir. Who is the person entitled to the lands for the remainder of the lives? Is it the legal personal representative of *Barron*; is it the trustees of the will of the testatrix, or the original lessor? I say that this is the question, because, in my opinion, it is not affected by the argument raised at the bar on the construction of the will of *Elizabeth Shepherd* herself.

It is suggested, on the part of the legal personal representative of *Barron*, that as the subjects of devise are freeholds, copyholds, leaseholds for lives and years, and the words of limitation are heirs, sequels in right, executors, administrators and assigns, by referring each word of limitation and succession to the various subject matters

(a) 4 *Term Rep.* 229.
 (b) 3 *Ell. & B.* 918.

(c) 9 *M. & W.* 662.

matters given, the word "heirs" applies to freeholds, "sequels in right" to copyholds, "executors and administrators" to leaseholds for lives and for years; but I am of opinion that this would be an improper and forced construction, and that the proper mode of construing all such words of limitation is, to refer them, as they properly ought to be, to the various subjects of the gift. Thus, that if the testatrix's property consisted of leaseholds for lives, demised to her and her heirs, and of other leaseholds for lives demised to her and her executors, the word "heirs" would apply to the former, and the word "executors" to the latter class of leaseholds. And it cannot be that all the persons so specified in the limitation are to be treated as special occupants pointed out by the testatrix, to be substituted one after the other, in case of the failure of the first, second, and so on, in succession. In fact, the words "according to the different tenures and nature thereof," as was properly observed in argument, displaces the point thus raised. But without it, I should be of opinion, that the same construction ought to prevail on this will, and that the same conclusion would follow, and that the words are properly referable to that to which they properly refer.


A question no doubt might have arisen, if the testatrix had possessed nothing but the leaseholds in question, and had simply devised them to *Barron*, his heirs, executors, administrators and assigns. That is not the case here, and the terms of the will do not, in my opinion, obviate the necessity of my disposing of the other and principal question which has been argued in this case.

Now the point is very neatly put in the case of *Jones v. Goodchild* (a), in a note which I read merely for the purpose

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(a) 3 *Peere Williams*, 33.

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purpose of stating it :—" A church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate ; what shall become of this lease ? Shall it go to the administrator of the bastard, or to the crown ? or does the limitation to the heirs make any difference ? or is it *casus omissus* out of the act of frauds and perjuries, and so remains liable to occupancy at common law ? or, lastly, is the lessor entitled, the lease being determined ; for that the premises, being granted to the lessee and his heirs during three lives, and the lessee being dead without heir, the lessor may re-enter in the same manner as where a grant is to a man and the heirs of his body for three lives (in which case the heirs of the body take as special occupants), remainder over, and the grantee dies without issue during the three lives. The remainder-man shall take." The point is raised by the learned reporter of that case, but is not determined by any case to which he refers, nor does he suggest the solution of it.

It is admitted, that if *Elizabeth Shepherd* had died intestate, the leasehold would have passed to her heir and not to her legal personal representative. It is also admitted, as indeed it could not be denied, that if *John Samuel Baron* had an heir, that heir would have taken the property ; but the question is, whether, where there is no heir, the legal personal representative can successfully claim the leaseholds, either as general occupant or under the terms of the statute ?

Now, if this question had arisen before the passing of the late Wills Act (*a*), a question of very great nicety and of considerable interest to the speculative legal student would, in my opinion, have arisen and must have been disposed of ; but I think that the question is settled
 by

(a) 1 Vict. c. 26.

by the 6th section of the Statute of Wills (a). That clause is in these words :—" If no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple ; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant ; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

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Now this appears to me strictly applicable. Here *John Samuel Barron* was seised of an estate *pur autre vie* to himself and his heirs and assigns under the will of *Elizabeth Shepherd*. He has made no disposition of it by will. If he had had an heir, the same would, to use the words of the statute, be chargeable in the hands of that heir as assets by descent, as in the case of freehold land in fee simple. Here there being no heir, the second part of the section applies :—" And in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold," (that is the case here,) then "it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant." The word "party" is evidently used for "person," so that the

(a) 1 Vict. c. 26.

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the statute directs that it shall go to the administrator of the person that had the estate thereof by virtue of the grant. The person who had the estate by virtue of the grant was the intestate, *John Samuel Barron*, who derived the estate by virtue of the gift, and derivatively through *Elizabeth Shepherd*. It must be treated exactly in the same way as if he had made a will appointing an executor, but had not disposed of this property, and had then died without an heir and intestate as to the real estate; the estate would then have gone to the executor by these words, and would have been assets in his hands, according to the latter words of the section. It is clear, therefore, that there being an administrator here, the words are governed by the statute, and that therefore the administrator, who has taken out administration, though by virtue of the grant from the crown, stands exactly in the same situation as the person entitled.

Having come to a clear conclusion on that subject, it would be improper to discuss or to go into the question of what would be the effect, if that section did not dispose of the property, which would have raised a point of very considerable nicety. I feel satisfied that one of the objects of the framers of the statute was, to cover this case, and to preclude the question stated in the note in *Peere Williams* from arising.

I am of opinion, therefore, that this demurrer must be overruled.

1857.

ELLIS v. BARTRUM. (No. 1.)

3 Dec.

THE testator, by his will, dated in *August*, 1855, gave, among other bequests, as follows :—

“ I give and bequeath to *Frusanna Brooker* 80*l.* per annum Long Annuities to the year 1860, to be receivable and to be her property so long as she may remain unmarried ; and I also bequeath to her a deferred annuity of 80*l.* per annum, payable half-yearly in her life, so long as she may remain unmarried, and the first payment of such deferred annuity to commence at Michaelmas or Christmas, 1859 ; the said deferred annuity to be safe and certain to her, and purchased by my executors.”

The testator made a codicil, dated the 13th of *October*, 1856, in the words following :—


“ I, *John Ellis*, do make this my last (and now only) codicil to alter my will of 21st *August*, 1855. I will and direct, that my executors and trustees make my Long Annuities of 80*l.*, instead of 80*l.*, be only 30*l.* per annum, and a reversionary annuity purchased on her life for 30*l.*, as I have lately expended money on her account.”

A testator, by his will, gave *F. B.* 80*l.* per annum Long Annuities to the year 1860, and a “ deferred annuity” of 80*l.* from Christmas, 1859. By a codicil (which did not mention *F. B.*’s name) he said, I direct that my executors “ make my Long Annuities of 80*l.*, instead of 80*l.*, be only 30*l.* per annum, and a reversionary annuity purchased on her life, 30*l.*, as I have lately expended money on her account.” Held, that *F. B.* was referred to, and that she was entitled to 30*l.* a year only.

The testator died on the 31st day of *October*, 1856.

The Chief Clerk certified, that under the testator’s will and codicil, *Frusanna Brooker* was entitled to receive 30*l.* per annum Long Annuities to the year 1860, so long as she remained unmarried, and from the expiration of the Long Annuities she was entitled to receive

an

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an annuity of 30*l.* per annum, payable half-yearly during her life, so long as she remained unmarried.

The legatee, *Frusanna Brooker*, applied to vary the certificate, by certifying that during her life, and until her marriage, she was entitled to 80*l.* per annum Long Annuities to the year 1860, and an annuity of 80*l.* per annum from the expiration of the Long Annuities.

Mr. *R. Palmer* for the Plaintiff.

Mr. *W. D. Lewis* for *Frusanna Brooker*.

By the will, there is a clear gift of the 80*l.* a year to the legatee; of this she cannot be deprived, except by expressions equally clear in the codicil; *Cleoburey v. Beckett* (a). Her name is not mentioned in the codicil, and it is only by conjecture that she can be said to be the person referred to.

The testator in his codicil speaks of having “lately” expended money on her account. The only expenditure for the legatee was prior to the will, which was dated fourteen months before the codicil, and the expression “lately” cannot refer to her.

The MASTER of the ROLLS.

I am of opinion that the Chief Clerk has come to a right conclusion. The testator, by his codicil, says, I alter my will, and I direct my executors to “make my Long Annuities of 80*l.*, instead of 80*l.*, to be only 30*l.* per annum.” I turn to the will, and I find that it contains only one gift of 80*l.* Long Annuities, and that is to *Frusanna Brooker*; *primâ facie*, therefore, this is the gift

(a) 14 *Beav.* 587.

gift he refers to. He also uses the expression "her," which, therefore, shews that he refers to some gift which he had made to a woman. The expression "reversionary annuity" in the codicil refers to the "deferred annuity" given by the will, but which is an inaccurate expression for "deferred." It is, however, an annuity which she was to have at the expiration of the Long Annuities, and which is to be reduced from 80*l.* to 30*l.* I cannot strike those words out of the codicil, and must give effect to them.

As to the word "lately," the testator must have known whether he had expended money on her account or not. Even if he had done it before the date of the will, it is reasonable to suppose, that he considered that the provision he had made for her by his will was more than sufficient, and that it ought to be reduced from 80*l.* to 30*l.*

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ELLIS v. BARTRUM. (No. 2.)

THE testator bequeathed as follows:—"To the *surgeon and resident apothecary* of the *Southern Dispensary* of *Bath*" (and to other persons, and amongst them the "surgeons" of other dispensaries) "say I give and bequeath to all the persons noted 19*l.* 19*s.*, or any who may hold the like situations at my decease; the said sum to be paid to them separately and individually."

Mr. *Lawrence* and Mr. *Evans* were the surgeons at the testator's decease of the *Southern Dispensary*. There was no resident apothecary, but Mr. *Pearce* was "the dispenser."

The Chief Clerk found that each of these three gentlemen

3 Dec.
 A testator bequeathed 19 guineas each to the "surgeon" and resident "apothecary" of the *S. Dispensary*, or any who might hold the like situation at his decease. There were two surgeons and no resident apothecary, but a "dispenser." Held, that the three were entitled to 19 guineas each.

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tlemen was entitled to a legacy of 19*l.* 19*s.*, making together 57*l.* 17*s.*

The residuary legatee applied to vary the certificate, by omitting the 59*l.* 17*s.*, and finding that one sum of 19*l.* 19*s.* was due, to be divided between Mr. *Lawrence* and Mr. *Evans* equally.

In support of the finding, it was argued, that the testator had mistaken the number of the surgeons. That, at all events, the words "or any who may hold the like situations" were sufficient to justify the finding in favour of the surgeons and dispenser.

On the other hand, it was insisted that the word "surgeon" could not be changed into the plural, "surgeons;" and, secondly, that the gift was to the resident *apothecary*, and not to a *dispenser*. *Garvey v. Hibbert* (a); *Scott v. Fenoulhett* (b); *Tomkins v. Tomkins* (c); *Roper on Legacies* (d) were cited.

The MASTER of the ROLLS held that the certificate was right.

(a) 19 *Vesey*, 125.(b) 1 *Cox*, 79.(c) 19 *Ves.* 126, *note*.(d) *Vol.* 2, p. 182 (4th edit.)

ELLIS v. BARTRUM. (No. 3.)

Dec. 3.

A testator gave and devised to his executors his freehold house and all his other property he might die possessed of, "in trust for the purposes of his will." Held, that he had not

THE testator expressed himself as follows:—"I appoint *John Stothert Bartrum*, of *Bath*, *Benjamin Albin Tomkins*, of *Southwark*, and *Benjamin Marsland*, of *Walworth*, to be my executors; and I give, devise, and bequeath, my freehold house, No. 21, *Skinner-street*, *London*, and all my other property I may die possessed of, to the said executors, *in trust for the purposes*

created a mixed fund.

poses of this my will." He then gave a number of legacies to individuals and to charities out of pure personalty.

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 v.
 BARTRUM.

Mr. *R. Palmer* for the Plaintiff.

Mr. *Wickens*, for the *Attorney-General*, contended that the testator had blended his real and personal estate, and made it a mixed fund, for the purposes of his will, as in *Roberts v. Walker (a)*. The case of *Boughton v. James (b)* was cited in opposition to this view of the case.

The MASTER of the ROLLS.

I cannot treat this as a mixed fund.

(a) 1 *Russ. & Myl.* 752.

(b) 1 *H. L. Ca.* 406.

NOTE.—See also *Simmons v. Rose*, 21 *Beav.* 37, and 6 *De G., M. & G.* 411; *Tench v. Cheese*, 6 *De G., M. & G.* 453.

KNIGHT v. KNIGHT.

1858.

12 *Jun.*

THE testatrix, by her will, dated in 1819, bequeathed to her daughter *Hannah* the interest or dividends of 200*l.* £4 per Cent. Stock, for life, and after her decease she bequeathed the said sum amongst the children of her daughter *Hannah*, in case she should marry and have any. But, in default thereof, she gave it amongst her (the testatrix's) five other children (naming them). The testatrix then proceeded in these words:—"But in case all my said children shall be then dead [which event happened] I give and bequeath the sum of 200*l.* and interest equally among all my grandchildren, share and share alike, with benefit of survivorship, upon their

On a gift, after a tenancy for life, to a class equally, with benefit of survivorship, upon their severally attaining twenty-one, the survivorship was held to refer to the attaining twenty-one, and the representatives of one who attained twenty-one, but died in the lifetime of the tenant

severally for life, were held entitled to a share.

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Hannah had no child, and died in *September*, 1857. At that time the five other children of the testatrix were all dead, and there were only five of her grandchildren then living, all of whom had attained the age of twenty-one.

This was a petition by the five surviving grandchildren, praying payment between them of the fund in fifths.

Another grandchild, viz., *Henry Charlton*, had attained twenty-one, but had died eight months before *Hannah*, and the question was whether his representatives were entitled to participate in the fund.

Mr. *Collins*, Mr. *Hardy*, and Mr. *Boyce*, for the several parties.

The decision of the Vice-Chancellor *Kindersley* (a), on the 20th of *February*, 1856, on the same will, was cited, in which, upon the construction of a bequest to another daughter, *Mary*, for life, and, after her decease, to her children equally, "with benefit of survivorship upon their severally attaining twenty-one," the Vice-Chancellor had held, that the survivorship had reference to the period of attaining twenty-one, and not to the death of the tenant for life.

The MASTER of the ROLLS said he concurred in the view of the Vice-Chancellor, and that he thought the case reasonably clear, that the representatives of *Henry* were

(a) MS.

were entitled. He ordered the fund to be divided into sixths, and one portion to be paid to the representative of *Henry Charlton*.

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NOTE.—See 2 *Jarm. on Wills* (2nd ed.), 621, and the cases there cited; *Crosier v. Fisher*, 4 *Russ.* 398; *Tribe v. Newland*, 5 *De Gex & Smale*, 236; *Bouverie v. Bouverie*, 2 *Phillips*, 349.

WEDDERBURN v. WEDDERBURN.

Jan. 16.

THE testator, by his will, gave his personal estate to trustees, upon trust to sell and invest, and he directed that out of the dividends and interest his wife should receive an annuity of 500*l.* a year for life, and subject to the provision made for his wife, he gave the residue of his estate for the benefit of his children.

A testator bequeathed an annuity to his wife for life, and his residuary estate to his children. The executors set apart a fund to answer the annuity.

To provide for the annuity, the executors set apart three sums of Stock, sufficient to produce the 500*l.* a year for the widow.

Some of the children settled their shares in this fund, by specific description, and they afterwards incumbered the shares in the other residuary estate.


This suit was instituted by the children, the object of which will be found stated in 2 *Keen*, 722, 4 *Myl. & Craig*, 41, and 22 *Beav.* 84. It ended in a compromise, by which a sum of 15,000*l.* was paid by the Defendants in full discharge of all claims, and this formed part of the residuary estate. After payment of costs, this fund amounted to 8,823*l.* 14*s.* 3*d.*, Three per Cents.

By the reduction of the interest of the fund set apart, the capital of it was resorted to for payment of the annuity. Held, that the persons claiming under the settlements were not entitled, as against the incumbancers of the residue, to have the annuity fund made good out of the residuary estate.

Some of the children had made settlements of their shares in the funds set apart to answer the widow's annuity by specific description.

They had also incumbered their shares in the residuary estate to be recovered in the suit to other parties.

The interest on the Stock set apart to provide for the annuity

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 WEDDERBURN. annuity of 500*l.* a year having been reduced, the income of it became insufficient to produce the 500*l.* a year for the widow, and a portion of the capital was, from time to time, applied in paying it. The funds set apart thus became, at the death of the widow, (which had recently occurred,) reduced to 6,204*l.* New Three per Cents.

On the widow's death, it was referred to Chambers, to inquire whether any part of the 8,823*l.* 11*s.* 3*d.* ought to be set apart to make up the full amount of the trust fund originally set apart by the testator's executors to provide for the widow's annuity. This raised the question, whether the trustees of the settlements and the incumbrancers upon the fund set apart to answer the widow's annuity had a right, as against the incumbrancers on the funds recovered in the suit, to have so much of the *corpus* of the fund set apart to answer the annuity as had been sold, from time to time, to make up the annuity, replaced out of the 8,823*l.* 14*s.* 3*d.* Three per Cents. The Chief Clerk thought that this question was one entirely of parcels, and that each incumbrancer could only affect the particular fund comprised in the deed creating the incumbrance, and that as between the respective incumbrancers, the incumbrancers on the fund originally set apart to answer the annuity had no equity, as against the incumbrancers on the fund recovered in the suit, to have the annuity fund made up to its original amount out of the fund recovered in the suit. He, therefore, found, that no part ought to be set apart.

The unsuccessful parties took out a summons to vary the certificate, and they now claimed to be recouped, out of the 8,823*l.* 14*s.* 3*d.*, the amount of capital of the fund applied in payment of the widow's annuity.

Mr.

Mr. *Teed*, Mr. *Giffard*, Mr. *J. H. Palmer* and Mr. *Toller*, argued that the widow, who had two funds to resort to, having been paid out of that to which the parties interested under the settlement were entitled, the latter had a right, on the principle of marshalling, to stand in her place, and to have recourse to the other fund.

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Mr. *R. Palmer* and Mr. *Cole* were not called on.

Mr. *Wickens* and Mr. *W. D. Lewis*, for other parties.

The MASTER of the ROLLS.

The question is, what was settled? It was the specific fund described, and other persons were entitled to the other fund.

Suppose the annuity fund had been improperly sold out by the trustees, the persons entitled under the settlement would be entitled to say, that the trustees had committed a breach of trust, but they would have no right to go against the other fund, although the annuitant might have had a right to have her annuity paid out of all the funds. It is a question of what are the parcels in the deed, and what is made subject to the settlement. The funds in the deed have been reduced to 6,204*l.* I do not say whether rightly or wrongly, but that is the only sum affected by the settlement, and the sum of 8,823*l.* 14*s.* 3*d.*, which is not mentioned in the settlement, is not affected by it. It would be different if the words of the settlement had been "of the annuity fund and all funds from time to time to be recovered under the testator's will."

I must, therefore, confirm the certificate.

1858.

1855.

Apr. 26.

1858.

Feb. 17, 18.

A testator bequeathed a sum to Sir E. A. upon trust to lay it out in lands, for the endowment of a school. And he appointed that Sir E. and his heirs "should be seoffees in trust and patrons and protectors of the said school for the electing a fit and sufficient school-master." Held, that the right of patronage was alienable.

Observations as to the jurisdiction and authority of the Court to alter or modify charitable trusts.

When the founder of a charity commits the administration of it to a man and his heirs, this Court cannot interfere with their discretion, so long as they perform their trust properly.

In charity informations, where the case is doubtful, the Attorney-General should require a relator to be named to be answerable for the costs, even in cases certified by the charity commissioners.

Power of the Attorney-General to sanction a compromise in charity cases.

Presumption of legitimacy, under the circumstances, of a person named in a will of 1776 as the testator's son.

THE ATTORNEY-GENERAL v. BOUCHERETT.

THE Reverend *Francis Rawlinson*, by his will, dated in 1630, bequeathed 400*l.* to Sir *Edward Aschough*, upon trust to lay out the same in the purchase of freehold land, and to assure the same for and towards the foundation and maintenance of a free grammar school, to continue for ever, in the market town of *Caistor*, if the inhabitants would build a school-house for such purpose. And he directed the 400*l.* to be paid to Sir *Edward* to purchase lands of the clear yearly value of 20*l.*, and that if any part should remain, it should be repaid to his executors. He further appointed, *that the said Sir Edward and his heirs for ever should be seoffees in trust, and patrons and protectors of the said school, for the electing a fit and sufficient school-master, as often as the place should be void, and for letting and leasing of all such lands as should be purchased with the said 400*l.*, and for paying the master the yearly stipend that should arise out of the said lands.* And further, he desired that, having committed the whole trust thereof unto the said Sir *Edward* and his heirs, children should be taught free. In the event of the town of *Caistor* refusing or neglecting to build a school-house, he directed the lands to be assured by Sir *Edward* or his heirs unto *Sidney Sussex College*,
to

to be chosen by Sir *Edward* and his heirs. The testator died shortly afterwards.

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William Hansard by will made an additional provision for the charity.

The schoolhouse was built and real property was purchased, which now consisted of the tithes of *Bilsby*, commuted at 230*l.* per annum, and an estate at *Cumberworth*, let for 105*l.* a year.

The Defendant *Ascough Boucherett*, claiming to be heir at law of Sir *Edward Ascough*, acted as the visitor and patron of the school.

This information was filed by the Attorney-General without a relator, upon the certificate of the Charity Commissioners, made in 1837, against *Ascough Boucherett* and the schoolmaster. It alleged that the school was mismanaged, and stated as follows:—

“The Defendant *Ascough Boucherett* is not, in truth, the heir of Sir *Edward Ascough*, so as to be entitled to the appointment to the mastership of the school. The only connection between *Ascough Boucherett* and Sir *Edward Ascough* is, that one of the ancestors of *Ascough Boucherett* married a younger daughter of Sir *Edward Ascough*; but Sir *Edward Ascough* left several daughters, who, if he left no male issue, were his co-heiresses, and it cannot now be ascertained who are the heirs-at-law of the other daughters of Sir *Edward Ascough*.”

“It cannot now be ascertained in whom the legal estate of the charity property, or any part thereof, is vested.”

“New

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“New trustees of the said charity estates and premises ought to be appointed, and a scheme settled, under the direction of the Court, for the future management of the school, and the estates and premises belonging thereto, and for the appointment of a master and usher.”

The information prayed :—1st. That new trustees of the charity estates and premises might be appointed, and that proceedings might be taken for vesting in such new trustees the whole of the charity estates and premises. 2nd. That a scheme might be settled for the future management of the school, and of the property belonging thereto, and for the appointment of a master and ushers thereto.

A considerable mass of evidence was entered into as to the heirship and the management of the school.

Mr. *T. H. Terrell* in support of the information.

Mr. *Toller* for the Defendant.

The MASTER of the ROLLS.

The duties of the Court in matters of charity are perfectly distinct and clear. It is not its duty to direct charity property to be employed in such manner as it thinks will be the most beneficial for public purposes; but to carry into effect the intentions expressed by the founders, so far as those intentions are not inconsistent with any existing law. The authorities shew this very distinctly:—that the Court cannot vary and modify existing charity trusts, so as to meet its own views with regard to what it may think most beneficial and for the general advantage of the public, nothing
 but

but an Act of Parliament can do that. If, therefore, a founder of a charity directs that the heirs of a certain person shall be the trustees to administer the charity, so long as they perform the trusts properly, this Court cannot interfere with their discretion in that matter; but this Court will see that the trusts are properly administered, and that the directions and intentions of the founder are duly carried into effect.

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I have, therefore, in this case, two things to consider:—First, whether the Defendant is the person to carry these trusts into effect, and in the next place, whether the trusts are properly performed. In my opinion, there is, under the will of Mr. *Rawlinson*, a distinct trust given to the heirs of Sir *Edward Ascough*, as “patrons and protectors,” to establish the school, to appoint a fit and proper schoolmaster, to let the land in a proper manner, and to pay the yearly stipends out of the rest, in the manner directed by the testator.

It is possible that the trustee may require the direction of the Court, with reference to some matters which are not within the scope of his authority, or which are not sufficiently clearly expressed in the will of the original founder, and then undoubtedly it will be a proper thing for this Court to say, in regard to those matters as to which the will of the founder is silent, how those trusts shall be administered.

The first thing the Court has to consider is, who are entitled to administer this charity; and I am of opinion, that none but the heirs of Sir *Edward Ascough* are entitled to administer it. I do not mean thereby to prejudice the question, as to which I give no opinion, whether this is such a trust as a person might

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might alien, on the principle which I followed in the case of the *Attorney-General v. Ewelme Hospital* (a).

I must also express my opinion, that it is of the greatest importance, whenever there is a serious question relating to charities in a contested case, that the Attorney-General should require a relator to be named who may be answerable for costs. In a recent case of the *Attorney-General v. The Earl of Waldegrave*; I was obliged to dismiss the information, the costs fell on the charity, because there was no relator. It becomes therefore of great importance, that the jurisdiction of the Court should be exercised in the absence of a relator only in those cases in which it is called on to carry into effect something which is manifest and plain: if the case depends upon a contest of evidence, a relator should be appointed, in order that the Court may be able to make the costs follow the result: I think it my duty to express this opinion, in order that individuals and charities may not be injured by proceedings intended to benefit a charity, but in which, if the same investigation which takes place in the suit had been made before it was commenced, it would have appeared, that there was no sufficient ground for instituting any proceedings.

I do not know whether it will ultimately turn out for the benefit of the charity or not, but all I can do, in this case, is to direct these inquiries, to which the informant is entitled:—

1. An inquiry who now is or are the heir or heirs at law of Sir *Edward Ascough*.

2. An inquiry what is the present state and condition
of

(a) 17 *Beav.* 366.

of the school, and whether it is desirable that any and what alteration should be made in the existing rules for the management thereof.

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I shall not require the same strict proof of heirship as I should do in a case where I was distributing a large sum of money in Court, and I shall endeavour to diminish the expense of the inquiry as much as lies within my means.

I also beg to express my conviction that the Attorney-General has full and ample powers, wherever he thinks that a proposal of the Defendant to arrange the matters in dispute, though it does not concede the utmost the charity is entitled to, will, on the whole, be more beneficial to the charity than a long and contested litigation, to accept it, and carry that proposal into effect: and if the matter were brought before the Court, it would pay that respect to his opinion which it has always been its custom to pay, and sanction the arrangement.

The Chief Clerk certified, that the Defendant *Ascough Boucherett* brought into the Chambers a pedigree, but declined to support such pedigree by any evidence except that produced at the hearing of the cause, and the said Defendant having failed to support such pedigree, advertisements for the heir had been published, but no one had come in under the advertisements.

2. The present state and condition of the school (so far as the conduct thereof is concerned) are satisfactory, but the existing rules for the management thereof are imperfect and unauthorized by any sufficient authority, the same having been framed under the supposition that
the

1858. the heir of *Edward Ascough* was known, and that such
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 ATT.-GEN. heir would be the governor and patron of the school,  
 W. and inasmuch as no such heir has been found, it is fit  
 BOUCHERETT. and proper that trustees should be appointed, in whom  
 the charity estate and the government of the school  
 should be vested, and that a scheme should be settled  
 for the future regulation of the charity.

The appointment of the Defendant, the Rev. *Anthony Bower*, as head master of the school, is invalid and inoperative. He is a fit and proper person to be the master, and it is expedient that he should be duly appointed, subject to such provisions as may be made by any scheme to be settled, and provision should also be made for the appointment of a second master.

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The cause now came on for further consideration.

As to the heirship, the facts were shortly as follows : The great grandson of Sir *Edward Ascough* died in 1703, without issue, leaving his two sisters, Mrs. *Thornhaugh* and Mrs. *Boucherett*, his co-heiresses. By a deed of partition, dated in 1719, the right of patronage of the school was given to *Matthew Boucherett*, the great grandfather of the Defendant, from whom it descended to the Defendant's grandfather, who, by his will dated in 1776, devised it to the Defendant's father, from whom it descended to the Defendant. It was contended, first, that the Defendant's father was illegitimate, and, secondly, that the right of patronage was inalienable and could only be exercised by the heirs of the original trustee.

Mr. *Selwyn* and Mr. *T. H. Terrell* for the *Attorney-General*.

Mr.

Mr. *Follett* and Mr. *Toller* for the Defendant.

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Feb. 17.

*The MASTER of the ROLLS.*

The view I take of the case is, that it must go back to have the certificate amended. I think that the will of *Ascough Boucherett* of 1776 is *prima facie* evidence that the son mentioned therein was his legitimate son, and that after that, the burthen of proof would lie on any person who disputed it to prove the contrary. In the absence of such proof, the Chief Clerk should state, that it appeared upon the evidence that Mrs. *Boucherett* was one of the co-heirs of the first Sir *Edward Ascough*, and that the other of such co-heirs would be the heir of Mr. *Thornhaugh*, but that no person had come in to claim. I think he ought then to state, as special circumstances, that by the deed of partition the right of appointment to the school was given to *Matthew Boucherett*, and was afterwards, by the will of his son, devised to the father of the Defendant.

I am of opinion that the case of the *Attorney-General v. The Master of Brentwood School* (a) governs this case, and that the right of patronage is quite as much within the power of alienation as it was in that case, and that no distinction arises from the fact that the property here is given in trust, and that the feoffees take it in trust for the purposes of a school, and that they are to be the "patrons and protectors of the school." That gives them the power of appointment in the first instance, and it is impossible to say that it is more a trust in one case than in another. If the power is given, as it was in the case of the *Brentwood School*, directly, to appoint the schoolmaster, it is still a trust to be performed, for it is clear that the patron

(a) 1 *Myl. & K.* 382, and 3 *Barn. & Adol.* 59.



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patron could not appoint a person manifestly unfit, as for instance a person of unsound mind or an infant ; he must appoint a person who is fit and proper for the purpose of carrying on the school, and to that extent, but no further, it is a trust in every such case.

That being my view of the case it is clear how I shall dispose of it when it comes back on further consideration.

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Mr. *Selwyn* for the *Attorney-General* said, that as the decision of the Court rendered the question of legitimacy immaterial, he did not require any further inquiry.

*The MASTER of the ROLLS* said, that in this case he would amend the certificate and make a declaration of the Defendants' right and stay all further proceedings. He refused to appoint new trustees, the testator having appointed Sir *Edward* and his heirs feoffees in trust. He gave the Defendants their costs out of the charity estate, but none to the Informant.

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HUNT v. NIBLETT.

Feb. 19.

Order for substituted service of a traversing note made, without proof that the Defendant was within the jurisdiction.

**A**N order had been made for substituted service of a traversing note upon a Defendant's solicitors at *Farnborough*.

The Registrar objected to draw up the order, on the ground that no evidence had been produced that the Defendant

Defendant was within the jurisdiction; *Anderson v. Stather (a)*.

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Mr. *Southgate* applied to the Court that the order should be drawn up, notwithstanding the objection. He cited *Moss v. Buckley (b)*, and see *Wallis v. Darby (c)*.

The MASTER of the ROLLS directed the order to be drawn up.

(a) 16 L. J. Ch. 152.

(c) 6 Hare, 618.

(b) 2 Phil. 628.

# MERLIN v. BLAGRAVE.

Feb. 16, 25.

THE testator *John Blagrove*, by his will, dated the 6th of November, 1787, devised to two trustees and their heirs, all his real estate whatsoever and wheresoever, in trust to pay, out of the rents and profits of all his freehold estates, and out of the rents and profits of his leasehold estates in *Reading*, unto his sister-in-law Mrs. *Frances Blagrove*, during her life, an annuity of 100*l.*; and thereout also to pay unto his niece *Anne Cullum* (then the wife of the Reverend *James Cullum*, clerk), during the joint lives of her and *Frances Blagrove*, an annuity of 300*l.*, and after the decease of either of them, to pay unto the only child of the said *Frances Blagrove* who should attain that age, to raise 10,000*l.*, and pay the same to him at that age. Or in case *A. C.* should, "at her decease, have two or more children," then to raise an annuity for their maintenance "until they should respectively attain twenty-five, and when they respectively attained that age, to pay each an equal share of the 10,000*l.*" The Plaintiff was *en ventre sa mere* at the testator's death, and was the only child of *A. C.* who survived her. Held, that the bequest of the 10,000*l.* was too remote.

Costs out of the estate directed to be paid to the Plaintiff who wholly failed in her suit, the trustee, who was a Defendant, having asked for a declaration as to the construction of the will.

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decease of *Frances Blagrove*, widow, if *Anne Cullum* should survive her, then to pay unto *Anne Cullum* an annuity of 400*l.* And from and after the decease of *Anne Cullum*, in case she should have only one child which should survive her, then in trust to pay, out of the rents and profits of his said estates, the clear yearly sum of 200*l.* for the maintenance, support and education of such only child, until he or she should attain the age of *twenty-five years*, and from and after such only child should have attained that age, then in trust, by the ways and means thereafter mentioned, to levy and raise the sum of 10,000*l.*, and pay the same to him or her at that age, for his or her portion or fortune. Or in case the said *Anne Cullum* should, at her decease, have two or more children, which should survive her, then in trust, out of the rents of his freehold estates, and of his leasehold estates in *Reading*, to pay the clear yearly sum of 400*l.* for the maintenance, clothing and education of such two or more children until they should respectively attain the age of twenty-five years, each child having an equal part thereof applied for his and her benefit, and when and as they should respectively attain that age, in trust to pay unto each of them an equal share or part of the principal sum of 10,000*l.*, to be levied and raised in manner thereafter mentioned. Or in case the said *Anne Cullum* should at her decease have two or more children, and they should, by death, be reduced to one, before they should respectively attain the age of twenty-five years, then such one child should, from that time, have only 200*l.* per annum raised for him or her, until he or she should attain the age of twenty-five years, and at that age such only child should have the principal sum of 10,000*l.*, levied and raised in manner thereafter mentioned, which should be then paid to him or her for his or her portion or fortune; or in case the said *Anne Cullum* should leave

leave no child or children, or having such, and neither of them should survive her and live to attain the age of twenty-five years, then his will was, that the said 10,000*l.* or any part thereof should not be raised, but should sink into his freehold and personal estates charged with the payment thereof. And the testator's will further was, that *James Cullum* and *Anne* his wife should, within three months after his decease, release and discharge *John Blagrove* and his wife from all money, benefit and advantage whatsoever which *Anne Cullum* might be entitled to under the marriage articles entered into by her sister *Frances* and her husband prior to their marriage. And in case they should refuse, that then only the annuity of 300*l.* should be raised by his trustees for *Anne Cullum* and her children, out of which 100*l.* should be paid to *Frances Blagrove* during her life, in manner aforesaid, and that the remaining 100*l.* of the annuity of 400*l.* should sink into his estates chargeable therewith; and in that case only 8,000*l.* should be levied and raised for the benefit of the child or children of *Anne Cullum*, in manner thereinbefore directed, and that the remaining 2,000*l.* should sink into his estates.

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The testator died some time in the month of *November*, 1787. There were issue of the said *James Cullum* and *Anne* his wife two children only and no more, that is to say, the Plaintiff *Ann Merlin*, formerly *Cullum*, who was *en ventre sa mère* at the testator's death, and was born on the 3rd day of *July*, 1788, and *Arethusa Galatea Cullum*, who was born on the 13th day of *June*, 1790, and died in the lifetime of the said *Anne Cullum*, on the 2nd of *October*, 1812. *Ann Cullum* survived her husband, and died in *January*, 1856, aged 91, and the Plaintiff alleged, that thereupon  
 she

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she became entitled to have the 10,000*l.* raised under the trust of the testator's will.

The Plaintiffs Mr. and Mrs. *Merlin* filed this bill in *July*, 1856, against the persons entitled to the estate and the trustees, praying:—1st. That so far as might be necessary, the trusts of the will of the testator, *John Blagrove*, might be executed under the Court. 2nd. That the 10,000*l.* might be raised out of the real estates of the testator, and paid to the Plaintiffs.

Mr. *R. Palmer* and Mr. *Bevir* for the Plaintiffs. It will be argued that this gift is void for remoteness, and the question will be, whether the bequest to the Plaintiff is not within the legal limits, and at what time the gift became vested. Here it was vested immediately, but the payment only was postponed. The age of twenty-five is the period of payment, and not the period of vesting, for the word used is “pay.” The law favours vesting, and devises have been frequently held vested, notwithstanding the terms of apparent contingency, as in *Boraston's case* (a), and *Bromfield v. Crowder*, affirmed by House of Lords (b); see 14 *East*, and *Sugd. Law of Property* (c); *Jackson v. Marjoribanks* (d); *Milroy v. Milroy* (e). Here the intention was to give the capital, with an interim provision; and a direction, to apply the interest for the benefit of a legatee, affords evidence of an intention to vest the capital; *Davies v. Fisher* (f). This construction is strengthened by the subsequent condition of executing a release within three months; at all events the testator must have considered, that some equivalent

(a) 3 *Rep.* 19.(b) 1 *Bos. & P. (N. R.)* 313.(c) *Page* 226.(d) 12 *Simons*, 93.(e) 14 *Simons*, 48.(f) 5 *Beav.* 209.

equivalent provision would take effect in favour of the niece and her children on the execution of the release. In *Torres v. Franco* (a), the Court considered the gift over inconsistent with the clause importing that the gift was contingent, and therefore came to this conclusion: that "when clauses are conflicting, the rational presumption is, that a child attaining twenty-one takes a vested interest."

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[*The MASTER of the ROLLS*:—My difficulty is this: the 10,000*l.* is not to be raised immediately on the death of Mrs. *Cullum*, but only when a child attains twenty-five; how can there be a vested interest in a fund which does not exist?]

The case of *Leeming v. Sherratt* (b), corrected the misconception founded on *Leake v. Robinson* (c), that when a legacy is given in the form of a direction to pay, it must necessarily be contingent.

The Plaintiff was *en ventre sa mère* at the date of the will and at the testator's death, and therefore legally *in esse*, consequently the gift to her (a person then in being) at twenty-five was perfectly valid, and not too remote. The form of the gift distinguishes this from those cases where there has been a gift to an uncertain class, some of whom may not come into *esse* within a life or lives in being and twenty-one years afterwards, such as *Gooch v. Gooch* (d); *Greenwood v. Roberts* (e). The limitations in those cases were held too remote, because the invalidity as to some of the class was inseparably mixed up with the gift to the others. But here, the  
gift

(a) 1 *Russ. & M.* 649.(b) 2 *Harc.* 14.(c) 2 *Mer.* 363.(d) 14 *Beav.* 565.(e) 15 *Beav.* 92.

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gift is this: "After the decease of *Ann Cullum*, in case she shall only have one child which shall survive her," to maintain such child until twenty-five, and after such child attains twenty-five, to raise and pay 10,000*l.* Here the very event has happened; the Plaintiff is the only child, and was *in esse* at the testator's death, and the gift to her is necessarily within proper limits as to time.

[*The MASTER of the ROLLS*: But how can I look at the subsequent events in construing the will?]

Both Lord *Redesdale* and Lord *Eldon* seem to have sanctioned that in *Tregonwell v. Sydenham* (*a*).

In *Cattlin v. Brown* (*b*) it was held that, "After a devise to *A.* for life, with remainder to all and every the child and children of *A.* for their lives, in equal shares, a devise over after the decease of any or either of such child or children, of the part or share of him, her or them so dying, unto his, her or their child or children begotten or to be begotten, and to his, her or their heirs for ever, as tenants in common, was good as to the children of such children of *A.* as were living at the death of the testator, for the gift to them must take effect, if at all, within the limits allowed by law; and the gift to every member of the class of children was single and independent of the gift to every other member of the same class, and could not be affected by the result of the gift as to such other members."

Here we have a gift to a person who must take, unless some subsequent event, within due limits, happens to deprive her, and she must, if at all, take within a  
 life

(*a*) 3 *Dow.* 205, 215.

(*b*) 11 *Hare*, 372.

life in being. The subsequent gift to several is an alternative gift.

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Mr. *Hetherington* for assignees of the Plaintiff's share.

Mr. *Follett* and Mr. *Wickens* for the tenant for life; Mr. *Lloyd* and Mr. *Boyle* for the tenant in tail, and Mr. *Dart* for the wife of the tenant for life.

The first gift is "in case she should have only one child," the second, in case she should "have two or more children." If this clause were transposed there could be no foundation whatever for the argument, for it would be simply the case of *Leake v. Robinson* (a). The gift would run thus:—In case she had two or more children, then to raise and pay 10,000*l.* when they attained twenty-five, but if "she should only have one child," the whole to such child. The position of these two clauses can make no difference, they must both be regarded in construing the will. This is a gift to a class of two or more, and the Plaintiff, by accident, was the only one when the period arrived, but any other sole surviving child would equally have taken the whole fund. You cannot look at subsequent events, for the question is as to the validity or invalidity of the limitation in its inception; regard must be had to all possible events, and the mere fact, that the gift might have included objects too remote, is fatal to its validity; *Jee v. Audley* (b). The rule is thus accurately stated by Mr. Justice *Cresswell* in *Lord Dungannon v. Smith* (c):—"It is a general rule, too firmly established to be controverted, that an executory devise, to be valid, must be

(a) 2 *Mer.* 363.

(c) 12 *Cl. & Fin.* 563.

(b) 1 *Cox*, 324.



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be so framed, that the estate devised must vest, if at all, within a life or lives in being and twenty-one years after; it is not sufficient that it may vest within that period; it must be good in its creation, and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years and the period allowance for gestation, it is not valid, and subsequent events cannot make it so."

This rule is also stated in *Cattlin v. Brown* (a):—"If the devise be to a single person answering a given description at a time beyond the limits allowed by the law, or to a series of single individuals answering a given description, and any one member of the series intended to take may, by possibility, be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding others."

The present case is altogether different from *Storrs v. Benbow* (b), where there were several legacies of 500*l.* each to the several members of a class, some of which were valid and others too remote, and being independent of each other they could be separated.

Mr. *Selwyn* and Mr. *Pole* for trustees; Mr. *Money* for other parties.

*The MASTER of the ROLLS.*

There is really no question. The way in which Mr. *Follett* put it is conclusive. The direction is this:—after the death of a lady "in case she should have only one child

(a) 11 *Hare*, 376.

(b) 2 *Myl. & K.* 46.

child which should survive her," then in trust to pay out of the rents 200*l.* a year for the maintenance of the child until twenty-five, and after the child attained twenty-five, to raise 10,000*l.* and pay it to such child. But the testator goes on, "In case she should have two or more children which should survive her," to raise 400*l.* a year maintenance until twenty-five, and when they attain that age, to raise 10,000*l.* and pay it to them equally.

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Invert these limitations, and you have the case of *Leake v. Robinson* (a). It is a trust to maintain the class of children till twenty-five, and then to raise 10,000*l.* to be divided amongst them on attaining twenty-five years of age, and if only one, to that only one. It is precisely *Leake v. Robinson*. There is a class of children of *Anne Cullum*, and the members of that class are *those who should survive* her and attain twenty-five years of age, and they are to take equally, and there is no gift vested in them prior to that gift. It is obvious upon the mere statement of the rule against perpetuities that this gift cannot be supported; it is not vested till after a life in being and twenty-one years.

Such would be the case if the fund were in existence; but to prevent any question which could arise, the testator expressly provides, that no fund shall be raised or be in existence until a period which the law declares too remote.

The cases cited do not affect this case. In *Storrs v. Benbow* the gifts were to separate persons, and it was held that they might be treated as individual independent gifts. The passages read from *Lord Dungannon v. Smith*

(a) 2 *Mer.* 363.

1858. *v. Smith (a), and Cattlin v. Brown (b)* are conclusive
 in this case. I concur in them, and they accurately
 express the view I take.

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I am of opinion, therefore, that it is impossible for
 me to come to any other conclusion than that this gift
 is void for remoteness.

Feb. 25. The Plaintiffs having failed in their claim, the case
 was mentioned as to the costs. The following au-
 thorities were cited :—

Crouch v. Bresset, referred to in *Wheldale v. Part-
 ridge (c)*; *Wykham v. Wykham (d)*; *Lynn v. Beaver (e)*;
Windham v. Graham (f); *Douglas v. Cooper (g)*;
Thomason v. Moses (h); *Cooper v. Pitcher (i)*.

The MASTER of the ROLLS.

There is, I think, no question with respect to the
 general principle on which the Court acts upon these
 occasions. Where a bill is dismissed, it may be taken
 as a general rule that the Court gives no costs at all
 to the Plaintiff, and has no jurisdiction to give them.
 I think I stated that the only exception, if it be an
 exception, is the case of a bill for specific performance,
 where the Defendant the vendor is unable to make out
 a title; whether that ought to be an exception or not I
 cannot

(a) 12 Cl. & Fin. 546.
 (b) 11 Hare, 376.
 (c) 5 Ves. 398.
 (d) 18 Ves. 423.
 (e) Turn. & R. 70.

(f) 1 Russell, 347.
 (g) 3 Myl. & K. 382.
 (h) 5 Beav. 81.
 (i) 4 Hare, 485.

cannot say. I am not sure I did not state the proposition too broadly. I find, on referring to the case which I alluded to on this subject of *Lewis v. Loxham*, in 3 *Merivale*, 429, that the marginal note says, the Court refused to give the Plaintiff his costs, but what appears is this: It stood over to search for precedents, and this note is put in by the reporter. "This I had *ex relatione*. Upon reference to Reg. Lib., 1816 B., fo. 1059, however, it appears that the Defendant was ordered to pay to the Plaintiff his costs of the second reference and of the report made thereon, but not of the former proceedings. In *Springfield v. Ollett*, before the Vice-Chancellor, 19th *June*, 1817, I am informed that his Honor doubted, and seemed to think that a bill might be dismissed, and the Defendant, at the same time, made to pay the costs. But the point was not decided." At all events, even in this case of *Lewis v. Loxham*, which was a case for the specific performance of a contract, which failed by reason of the vendor, the Defendant, being unable to make out a good title, the costs of investigating, whether he could make out a good title or not, were ordered to be paid by him, although the bill was ultimately dismissed. Whether it has been extended beyond that, in any case or not, I cannot say; certainly, the authorities, which Mr. *Lloyd* has referred to, shew, very clearly, that even in a case like that of *Lynn v. Beaver (a)*, Lord *Eldon* being of opinion the bill ought to be dismissed, though he thought the fair thing was that the costs of all parties should be paid out of the estate, still would not do it without consent. It may be laid down as a general rule, that where the Court dismisses a bill it will not give the Plaintiff his costs. But there are two cases, certainly, and perhaps more, in which, where the Plaintiff

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(a) *Turn. & R.* 69, 70.

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tiff has failed altogether, but the bill has not been dismissed, the Court has given the Plaintiff his costs. One of those cases is, where the fund is administered by reason of the suit of the Plaintiff, and the rights of all parties have been ascertained and determined, and the fund divided accordingly, in consequence of the suit of the Plaintiff. The Court, in that case, though the Plaintiff takes nothing by the ultimate decision, gives him his costs. Another case is this: where, in fact, the fund is not administered by the Court, but where the Court is of opinion that it is either necessary or proper, at the instance of some person, that a declaration should be made determining the rights of the parties; and in that case, the Court makes a decree and gives the Plaintiff his costs. The case to which I referred during the argument was a case of *Ashe v. Berry*(a). The Lord Chancellor being about to dismiss the bill, the Plaintiff applied for his costs. The Lord Chancellor said, "when a bill filed by a person claiming as a legatee is dismissed, I cannot give costs to the Plaintiff. If it was a bill filed by the executor, the costs must come out of the estate." Then he says this, "I have a settled opinion on the point, but I shall read the cases. There are cases to be found both ways, but the principle is this:—that the costs of a bill dismissed are given to Plaintiff only where the fund in litigation could not be enjoyed by the party entitled to it without the declaration of the Court. In such cases only are the Plaintiff's cost of a bill dismissed given out of the fund." The counsel for the Defendant then applied to the Lord Chancellor to have the fund, which had been impounded during the progress of the suit, paid over to the Defendant; upon which the Lord Chancellor said, "Now, as the Defendant asks for something, I can give the Plaintiff his costs;" and accordingly he did not dismiss the bill, but he declared the

(a) 3 *Molloy*, 97.

the Defendant's right to the fund, and ordered it to be paid over to him after payment of the costs of all parties. He said the suit "was directed by the Master of the Rolls, and very properly directed, for there were counter opinions, and he thought a suit was necessary to decide. Although in form the legatee is the Plaintiff it is the same as if it was the executor instead of the legatee who filed the bill. The Court, therefore, will not dismiss the bill; will make a declaration that the legacy was adeemed and the residuary legatee entitled to the benefit, and then direct all parties' costs to be taxed, as between party and party, and paid in the first place." There, it was necessary to give the fund to the Defendant, but no one seems to have asked for a declaration in that case.

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Now the question before me is this: being of opinion that the Plaintiffs fail in the suit, if no person had made any application to me on the subject, I should simply dismiss the bill. But the trustee takes the opportunity, I admit at the suggestion of the Court, which he is at liberty to do, if he think fit, that it is desirable that the Court should make a declaration of what it considers to be the true construction of the will. I admit, that if there are cases which are so plain that no question could possibly have arisen, such as if a man disputes that an estate to a man and his heirs gives him the absolute interest in that estate, the Court would say, that it is not necessary to have a declaration in such a case. But the Court ought to be lenient in the construction of those questions, when it considers the difficulties imposed on trustees, and wherever a trustee comes and asks the Court for a declaration of its opinion, upon a difficulty created by the document which constitutes him a trustee, it is the duty of the Court to hold, that if there be a reasonable question or doubt,  
the

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the trustee is entitled to come to the Court to have that question determined.

I have to consider two questions. First. Whether this is such a case that, if the trustee had filed a bill, asking the Court for its declaration and opinion, I should have thought it a proper case to have given the trustee his costs out of the fund ; and, secondly, if that be determined in the affirmative, whether the fact of the trustees being Defendants, and of the legatee filing the bill for that purpose, places the trustee in so different a situation as to disentitle him to ask the Court for a declaration which may guide him in the management of the trust property ?

On the first question, I am of opinion, that if the trustee had come here for a declaration on this subject, I should have given him, and all parties to the suit, their costs. I certainly, upon hearing the case argued, entertained a clear opinion that the legacy was too remote, but it is impossible to say there was not a reasonable question to be argued. I do not say that it was argued at too considerable length, but it was not a mere statement to the Court as if the point could only be stated ; arguments were addressed to the Court of considerable ingenuity, which I had to consider and weigh, and though they did not influence my judgment, still a little alteration in the words might possibly have turned my view on the subject. The testator evidently intended (about that there can be no question) to give to the Plaintiff a legacy of 10,000*l.*, charged on the real estate, and because he gives it to the legatee on her attaining the age of twenty-five years, instead of twenty-one, it is too remote, by reason of the rule against perpetuities. A question was raised whether the Plaintiff was not a designated person, and not merely whether, being given after a life or lives in being,

being, and twenty-five years after, it was too remote ; and there were other points on the construction of this will which I should not have thought unreasonable for a trustee to submit to the Court. The trustee is a Defendant. Is he not entitled to have the opinion of the Court on this subject ? Mr. *Lloyd* very justly says, " he is my trustee." So he is, now that the Court has determined that no one else is the *cestui que trust* ; that point exists in all cases where the Court has to determine the construction of the will. After the decision of the Court, one of the contesting parties is the *cestui que trust*, and the Court thereby determines that the others have no interest. But will the fact of the persons against whom the Court decides being Defendants instead of Plaintiffs make it less the duty of the Court, at the instance of a trustee or executor, to pronounce a decision and make a declaration as to the true construction of the will ? I am of opinion it will not.

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Then, on the only remaining question, I am of opinion that this case is not so clear as to make it improper that a declaration should be made. I shall, therefore, make this decree :—The Defendants, the trustees, asking that the Court will declare the true construction of the will, declare, that according to the true construction of this will, the legacy of 10,000*l.* given to the children of *Anne Cullum* was void by reason of remoteness, and declare, that the devisees of the real estate took the estate, according to the limitations contained in the will, discharged and freed from such legacy of 10,000*l.* Then order that the costs of all parties be paid out of the estate of the testator, the costs of the trustees as between solicitor and client, and the costs of all other parties as between party and party.



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## HAYWOOD v. COPE.

Feb. 9, 11, 17.

A., by contract in writing, agreed with B. to take a lease of "those two seams of coal known as 'the two-feet coal' and the 'three-feet coal' lying under lands hereafter to be defined in the *Bank End Estate*," and B. agreed to let to A. "the before-mentioned seams of coal." Held, that the contract was sufficiently definite to enforce, and that the true construction of it was, that the boundaries of the estate, which consisted of about twenty-seven acres, were to be thereafter defined.

THE Plaintiff was seised of a farm called the *Bank End Farm*, situate in the parish of *Norton* in the *Moors*, in *Staffordshire*, and of the coals and minerals under it, and for working which shafts had been previously sunk, which had been visibly abandoned. The farm consisted of about twenty-seven acres, two roods, and two perches.

The Defendant applied to the Plaintiff for a lease of the coal mines, and after some negotiations, and after the Defendant, accompanied by some friends, had examined the shaft, as far as was possible (see *post*, p. 148) the Plaintiff and Defendant, on the 15th of *January*, 1855, signed the following agreement:—"Mr. *Charles Cope* agrees with *Howard Haywood*, Esq., for those two seams of coals, known as the two-feet coal and three-feet coal, lying under lands to be hereafter defined, in the *Bank End Estate*, near *Norton*, in the county of *Stafford*, at the rate of nine pence per ton for all coals and slack

A draft lease was prepared by the lessor, in pursuance of a written contract, which was not objected to by the lessee, who afterwards refused to complete. Held, that the draft lease could not be used for the purpose of controlling or explaining the contract itself.


The Plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards, the Defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The colliery turned out to be worthless. Held, that the Defendant could not resist a specific performance, on the ground of the Plaintiff not having communicated the fact of his having worked the mine and found it unprofitable.

A person contracting for the lease of a mine cannot resist its performance, on the ground of his ignorance of mining matters, and of the mine turning out worthless.

Specific performance is a matter of discretion, to be exercised, however, according to fixed and settled rules, and the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance.

Taking possession of a mine by intended lessee held not to be an acceptance of the title.

slack going over a weighing machine, 112 lbs. to cwt., or 2240 lbs. per ton, minimum rent 100*l.* per annum, on lease of fourteen years. Mr. *Cope* to pay for all surface trespass, at the rate of 5*l.* per acre, to commence paying minimum rent within eighteen months from date of agreement, all coals and slack sold or raised in the intermediate time to be paid for, at the rate of 9*d.* per ton. *Howard Haywood, Esq., agrees to let to Mr. Charles Cope the before-mentioned two seams of coals at the price before mentioned."*

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Shortly after the agreement had been signed the Defendant entered into possession. He commenced working the coal mines, and he continued to work them regularly until *July*, 1855, and off and on until *October*, 1856.

On the 26th of *May*, 1855, the Plaintiff's solicitor forwarded to the Defendant, for his approval, a draft lease, in which the particulars of the land under which the mines lay were defined and scheduled. The Defendant made no objection to the draft, and retained it, notwithstanding various applications made to him to return it. At *Christmas*, 1856, the Defendant first objected that the coals had not turned out so well as he expected, and in *January*, 1857, he declined to accept a lease, "on the ground that the mines were not (as he alleged) what they were represented to be, either as to thickness or quality; and that his surveyor had stated that the coal was absolutely not worth getting." The Defendant afterwards returned the draft lease.

On the 26th of *March*, 1857, the Plaintiff filed this bill, for a specific performance of the contract; for an  
 account

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account of the coal worked, and for payment by the Defendant of the royalty and rent.

The Defendant resisted the specific performance on the ground of the uncertainty of the contract, of the misrepresentation and concealment of the Plaintiff, of the delay which had occurred, and of the hardship of being obliged to pay 100*l.* a year during the remainder of the time, without receiving any benefit from the mines.

Mr. *Selwyn*, Mr. *Hadden*, and Mr. *Jessel* for the Plaintiff. The Defendant principally relies on misrepresentation and concealment, but there has been none; the Defendant examined the mine and acted on his own judgment; he cannot now repudiate the contract, merely because the collieries have turned out less profitable than he anticipated.

The rule of law as to concealment of the defects in the property sold is thus laid down by Sir *Edward Sugden* (a) :—"I. Moral writers insist, that a vendor is bound, in *foro conscientia*, to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force have, however, been advanced in favour of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality. Even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser, yet if they were patent, and could have been discovered by a vigilant man, no relief will be granted against the vendor."

So

(a) 1 *Sugden's Vendors & Purchasers*, pp. 1, 2.

So in *Attwood v. Small* (a) it was held, "that if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being *caveat emptor*, and the knowledge of his agents being as binding on him as his own knowledge."

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Mining operations are always of a doubtful and speculative character; the Defendant had the same sources of information open to him as the Plaintiff, and he availed himself of them; he cannot, therefore, complain; *Jennings v. Broughton* (b). In *Clapham v. Shillito* (c), Lord Langdale thus states the law:—"Cases have frequently occurred in which, upon entering into contract, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a Court of Justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded."

"Again, when we are endeavouring to ascertain what  
reliance

(a) 6 *Cl. & Fin.* 232.  
(b) 17 *Beav.* 234.

(c) 7 *Beav.* 146.

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reliance was placed on representations, we must consider them with reference to the subject matter, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other."

*Mr. R. Palmer* and *Mr. Southgate* for the Defendant. This is not a contract of which the Court will decree the specific performance. First, it is too vague and uncertain in its terms; it is of something "to be hereafter defined."

Secondly. There was misrepresentation by the Plaintiff's agent, both as to the quality and thickness of the seam of coal, and the coal turned out to be impregnated with sulphur and unfit for domestic use; the fact that an attempt had been made by the Plaintiff to work the mine, which had altogether failed, was carefully concealed by the Plaintiff from the Defendant.

Thirdly. There has been so great a delay, on the part of the Plaintiff, in enforcing the contract, that the Court will not interfere in his favour; *Watson v. Reed*

*Reed (a)*; *Southcomb v. The Bishop of Exeter (b)*; and time is more essential in the case of mines than of other property; *Macbryde v. Weekes (c)*.

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Fourthly. The Court, in cases of specific performance, exercises a discretion, and in cases of hardship will not interfere, but leave the Plaintiff to his remedy at law; *Day v. Newman (d)*; *Wedgwood v. Adams (e)*; *Watson v. Marston (f)*. Here it would be unreasonable to inflict on the Defendant the liabilities of a lease when the mine is confessedly worthless.

Fifthly. On another point, as to aiding the original contract by subsequent declarations and the draft lease, they cited *Boydele v. Drummond (g)*; *Brodie v. St. Paul (h)*; *Kenworthy v. Schofield (i)*; *Sugden's Vendors & Purchasers (k)*.

Mr. *Selwyn*, being called on to reply as to the uncertainty of the agreement, argued, that there was sufficient certainty in the agreement as to the subject to be leased; it was the two seams of coal under the Plaintiff's estate; and that which was "to be hereafter defined" was the boundary of the estate. He referred to *Owen v. Thomas (l)*, in which there was a contract to sell "the house in *Newport*," without any further description, except that the contract referred to the deeds being in the possession of Mr. *D.*: it was held that the subject of the contract was sufficiently defined. He further argued, that the point was not raised on the pleadings, and

(a) 1 *Russ. & Myl.* 236.

(b) 6 *Hare*, 213.

(c) 22 *Beav.* 533.

(d) 2 *Cox*, 77.

(e) 6 *Beav.* 600.

(f) 4 *De Ges. M. & G.* 230.

(g) 11 *East*, 142.

(h) 1 *Ves. jun.* 326.

(i) 2 *Burn. & C* 945.

(k) Page 180 (11th ed.)

(l) 3 *Myl. & K.* 353.

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and that the draft lease, which had never been objected to, contained the boundaries of the property, and completely removed all doubt or difficulty on the subject.

*The MASTER of the ROLLS.*

Feb. 17. I am of opinion that the Plaintiff is entitled to a decree for specific performance.

The first objection is upon the terms of the contract, which are said to be too vague to be carried into effect.

The words are these:—*Cape* agrees with *Hayward* “for those two seams of coal known as the ‘two-feet coal’ and the ‘three-feet coal,’” lying under lands to be hereafter defined in the *Bank End* estate, near *Norton*; and Mr. *Hayward* agrees to let to *Cope* the before-mentioned two seams, at the price before mentioned. It is said that this is an agreement to lease an uncertain quantity of land, and therefore that it is too vague to be enforced. It is so if this be the right construction of the contract. But, on the other hand, it is said, the proper way to read it is this,—as an agreement to lease two seams of coal, lying under the lands of the *Bank End* estate, the boundaries of which are to be hereafter described and defined.

I think this is the correct meaning of the contract, and this appears to have been the meaning of the contract attached to it by the parties themselves on both sides.

I find, from the evidence, that the *Bank End* estate is not an indefinite or large tract, but is a name given to a small farm belonging to the Plaintiff, containing between twenty-seven and twenty-eight acres of land.

I find that though contests have arisen between the Plaintiff and Defendant on the subject of the contract, yet that it was never suggested, until the papers came before the professional advisers, that the subject matter of the contract was in doubt, or that the extent of the land under which the coal was intended to be demised was a matter of doubt, and one to be afterwards settled and agreed on; on the contrary, when the draft lease was prepared and sent to the Defendant, in *May*, 1855, no observation was made with respect to the description or extent of the parcels as contained in that document.

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It is quite clear, as has been observed, that this document cannot be used for the purpose of controlling or explaining the contents of the contract itself; but it does shew what was the intention, and that no doubt existed in the mind of the parties themselves with reference to the meaning of that contract. I think the construction I have put on this document, which is the plain and natural one, is that which the parties themselves put upon it, and that it never entered into the heads of either of them, until the suit was instituted, that the whole of the two seams of coal under the *Bank End* estate was not to be demised, but only some portion of it, which was afterwards to be agreed on. I believe that the Defendant considered himself entitled to work any part of the coal under the farm, and that the words "to be afterwards defined" merely meant this:—that there was to be an accurate description of the farm under which the coal was to be taken.

The objection therefore which was primarily put forward on the construction of the contract, in my opinion, fails.

The next objection is the misrepresentation, or rather



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a suppression, of the truth. It is shewn that twenty years before the contract, the Plaintiff worked these seams of coal, and then abandoned the work because it was not profitable. I think this objection also fails. There were two pits on the ground; before entering into the arrangement with the Plaintiff, the Defendant applied for leave to have these pits, or one of them, at least, cleared, that he might be at liberty to examine the coal in the shaft. This was done. He went down himself, and took with him three other persons, for the purpose of examining and ascertaining the value and nature of the seams of coal. It was not till after this had been done that he entered into this agreement with the Plaintiff. He says, that he had no knowledge of mines and coal, and that he was wholly ignorant of these matters. He ought, then, to have employed some person who had a proper knowledge for that purpose, which, I believe, he did. It would be no excuse for a man, who had himself personally inspected a house, for the purpose of seeing whether it was in a proper state of repair, afterwards to contradict his own judgment, on the ground that he was not a surveyor, and was unable to say whether the house was in a sufficient state of repair or not. Here he did not trust to his own judgment, but, as I have already observed, three other persons accompanied him, some of whom seem to have given him their opinion.

With reference to Mr. *Brindley*, I think it very immaterial whether he did or did not state the words which are imputed to him. I see no reason to doubt that what he said (if he said anything) was *bonâ fide*, and that he *bonâ fide* believed it was the real value of the land, and the evidence satisfies me, that the Defendant took the lease, not on the faith of the representations of *Brindley*,  
 if

if he made any, but on his own opinion and that of others, as to the value of the mine to be worked.

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The next question is, was the Plaintiff bound to say that he had worked the mine and that he had found it unprofitable? That some one had worked and abandoned it was obvious, for there were the shafts and the abandoned workings which the Defendant examined. Was it incumbent on the Plaintiff to inform him that he was the person who had worked it some twenty years before, and found it to be not worth working? It is to be observed, that the subject matter of this contract is a mine, that is to say, seams of coal, which may turn out better or worse, and is always, in some degree, a speculation. It may turn out better, or it may turn out worse, and it is well known, that leases and sales are always made with reference to this circumstance. With the exception of knowing that the Plaintiff had worked it, the Defendant knew as much as anybody could know by his own examination; but whether the seams were to improve or to deteriorate was a matter which could only be ascertained by the future working. They have turned out ill, but the consequence of that is not, in my opinion, that the Defendant can reject the contract, any more than the Plaintiff could have rejected it, or have demanded higher terms, if the seams had turned out profitable.

Another objection is the length of time that has elapsed before the bill was filed. This also appears to me to fail. The Defendant received the proposed draft of the lease in *May*, 1855, he continued working it till *July*, 1855, he then complained of the mine, and said it must be abandoned; but it appears from the evidence, that he worked the mine, on and off, down to *October*, 1856.

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The solicitor of the Plaintiff, who sent the draft of the lease on the 26th of *May*, 1855, also says, that he received no communication of any sort from the Defendant or his solicitor, in answer, till the month of *January*, 1857, when the Defendant's solicitor came to him and stated, that the Defendant was desirous of abandoning the agreement, upon which the Plaintiff's solicitor said, "you must put that proposal in writing," and, accordingly, he sends in a proposal to that effect in writing, which was declined on the 2nd day of *February*, 1857, and the bill was filed on the 26th of *March* following.

In order to have entitled the Defendant to make time an element in this matter, he ought to have given the Plaintiff a formal notice that he repudiated the agreement, that he had abandoned the mine, and would have nothing more to do with the transaction. If this had been done, and the Plaintiff had not after a considerable length of time proceeded with due diligence, then undoubtedly the Court would not have allowed him to have enforced the contract; but here I find that the Defendant worked regularly until *July*, 1855. He went on trying it more or less until *October*, 1856, and in *January*, 1857, he makes a written proposal as to the abandonment of it, and the bill is filed in *March*, 1857. The real fact is, that the speculation has turned out extremely bad, and this is shewn by the evidence. The seam dwindled down from three feet to twenty inches, but if instead of diminishing it had increased to that extent, the Court would probably have heard nothing about it.

Then it is said, that this is an extremely hard case, that, in point of fact, the Plaintiff is insisting upon the Defendant paying him 1,400*l.* for a thing that has turned out to be literally worth nothing, and that  
 according

according to the discretion which the Court exercises in such cases, it cannot compel specific performance of the contract. Upon this subject, which is one upon which I have before made several observations, I will refer again to a passage which I have always considered binding upon me, for it is most important that the profession, and those who have to advise in reference to this subject, should understand the rule which is adopted in this and the other Courts, which is, that the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. Lord *Eldon* observes in the case of *White v. Damon* (a), "I agree with Lord *Rosselyn*, that giving specific performance is matter of discretion; but that is not an arbitrary capricious discretion. It must be regulated upon grounds that will make it judicial." I also refer, as I believe I have upon former occasions, to a passage in the celebrated argument of the Master of the Rolls in *Burgess v. Wheate* (b), where, at the conclusion, he cites a well known passage from Sir *Joseph Jehyll's* judgment (c), upon the subject of the discretion of the Court, and gives his own opinion. He says, "And though proceedings in equity are said to be *Secundum discretionem boni viri*, yet, when it is asked *vir bonus est quis*, the answer is, *qui consulta patrum, qui leges juraque servat*. And as it is said in *Rooke's* case (d), that discretion is a science, not to act arbitrarily according to men's wills and private affections,

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(a) 7 *Ves.* 352 *Peere W.* p. 752, 753.(b) 1 *Eden*, p. 214.(d) 5 *Rep.* 99 b.(c) In *Cowper v. Earl Cowper*,

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so the discretion which is to be exercised here is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it and advances the remedy; in others, again, it relieves against the abuse or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as have been sometimes ignorantly imputed to this Court. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with. This description is full and judicious, and what ought to be imprinted upon the mind of every judge" (a).

If, therefore, in a case of this description, I were to say, that according to my discretion I ought to leave these persons to their action at law, upon what principle or ground could I do it, except that in a matter of speculation it has turned out very favourable to one party, and very unfavourable to the other. It is obvious that in the case of a sale by auction, if the property is sold for an extremely inadequate value, it is impossible for the person to repudiate the contract. The mere principle of what might have been fair, or what might have been a right thing to do between the parties, had all the elements of value been known which have since transpired, cannot be a ground for exercising or regulating the discretion of the Court when all the facts which were then in existence were known to both parties. I can understand that the Court will exercise a discretion, and will not enforce the specific performance of a contract, where to decree the performance of the contract will be to compel a person, who has entered inadvertently into it to commit a breach of duty, such as where trustees

(a) 1 *Eden*, p. 214.

trustees have entered into a contract, the performance of which would be a breach of trust. Those are cases where, by a fixed and settled rule, the Court is enabled to exercise its discretion; but the mere inadequacy or excess of value is not in my opinion a ground for exercising any such discretion as that which is suggested in this case. That this is a very hard case there is no doubt, and it may be extremely proper for the Plaintiff to make an abatement in respect of it, but that is a totally different matter, one which is in the *forum* of his own conscience, but not one which I can notice judicially. In my opinion, this is a contract which was fairly entered into between the parties; there is nothing to invalidate it, and the usual decree must therefore be made for the specific performance of the contract, with costs to the present time. A reference must be directed to chambers to settle the lease in case the parties differ.

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A question was then raised whether the Defendant had waived his right of objecting to the title.

*The MASTER of the ROLLS:* The draft lease was sent in *May*, 1855, and the mine turned out unprofitable in the *July* following. If the Defendant in *May*, 1855, had required to see the Plaintiff's title, I should have allowed him, and I should not have thought that the possession of the mine was an acceptance of the title. It is so necessary that immediate possession should be given of mining property under a term which is running out. I think I cannot hold that the Defendant has accepted the title; and if he asks for a reference on that point he must have it. It is not necessary to inquire  
when

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when it was first shewn, because that would not affect my making the Defendant pay the costs down to the present time; for in my opinion, there was no reason for resisting the contract. There will be a reference to chambers to settle the terms of the lease in case the parties differ, and whether the Plaintiff can make a good title.

Feb 12.  
 April 15, 16.

## SANDERS v. MILLER.

Devise to the children of A., B. and C. who should be living when the youngest attained twenty-one, with a direction, that "the present yearly rents" should be paid to the persons who brought up the children of C. Held, upon the context, that until the contingency happened, the rents were to be paid to such persons in trust not only for the children of C. but of A. and B.


THE testatrix, who died in 1856, devised, in substance, as follows:—I devise the seven shares in my freehold messuages at *Stamford Hill* unto all the children of my cousin *Elizabeth Hewer*, also the children of my cousin *Ann Davies Saunders*, likewise the children of my late cousin Mr. *James Robert Cole*, surgeon, "as may be alive at the time of the last youngest child of any of them attaining the age of twenty-one years, share and share alike, in the rents and profits for them and their heirs for ever. But should only one survive, to that only one, his or her heirs for ever; but should I die before then, the present yearly rents are to be paid to those who bring up the children of the late *James R. Cole*; and at any time, should the said freehold be wanted for any purpose by government, then the money arising from the sale thereof is to be laid out in some stock, that each party may receive the interest therefrom for ever."

A bill was filed for the administration of the real and

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personal estate. A part of the real estate was specifically devised, and gave rise to questions of construction; other part was devised to charities, which devise was void under the Statute of Mortmain. The residuary real estate descended on the heir, and the residuary personal estate was undisposed of, and went to the next of kin. Held, that the costs of suit attributable to the administration of the trusts of the real estate were payable out of the descended estates, and that those relating to the execution of the trusts of the personal estate out of the residuary personal estate.

The Plaintiffs were the children of *Elizabeth Hewer* and *Ann Davies Saunders*, and were all infants.

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The bill was filed against the executors, the children of *James Robert Cole* (infants), *Dupree*, who was the heir-at-law, and against the next of kin; but neither the *Attorney-General* nor the charities were parties, the devise as to the latter being clearly void. The bill stated, that the *Coles* alleged, "that according to the true construction of the will, they were entitled to have the rents of the seven shares of the freeholds at *Stamford Hill* applied exclusively for their benefit, until the last youngest child of *Elizabeth Hewer*, *Ann Davies Sanders* and *James Robert Cole* should attain the age of *twenty-one years*; whereas the Plaintiffs charge the contrary to be the case, and that the rents ought to be applied, equally, for the benefit of all the children of the testatrix's cousins *Elizabeth Hewer*, *Ann Davies Sanders* and *James Robert Cole* until the period aforesaid."

Mr. *R. Palmer* and Mr. *R. Moore* for the Plaintiff.

Mr. *Follett*, Mr. *Hardy* and Mr. *Shebbeare* for the Defendants:

*The MASTER of the ROLLS.*

The seven shares were given to all the children of three persons "as might be alive at the time of the last youngest child attaining the age of twenty-one." I should be disposed to think, if the matter stopped there, that this was not a vested interest until the youngest attained twenty-one. But there are two other directions which



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which deal with the interest in the meantime. Take the last of them first, it is this:—If the property be sold to Government, the money “is to be laid out in some Stock, that each party may receive the interest therefrom for ever.” That would be, each person presumptively entitled, or each of the children. There is a direction, that if the property is not sold, the “present rents are to be paid to those who bring up the children of the late *James Robert Cole*.” Does not the rest of the bequest shew an indication and guidance in what way the rents were to be distributed? It is admitted that the persons who bring up the children are not to take beneficially; if not, who are their *cestuis que trust*, is it the whole class, or are two of the classes to be excluded, and the benefit of the intermediate rents restricted to the family of *Coles*, or are not those who bring them up merely selected as the persons to receive the rents? I am of opinion that “the present yearly rents” are to be paid to them as trustworthy persons, but to be applied for the benefit of the children of all the three families until the period of distribution, and then the distribution is to take place between those who may be alive.

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Another question arose under these circumstances. Besides the devise of the *Stamford Hill* property (as to the construction of which the bill stated there was a question) the testatrix devised some other real estate in *Crown Street* and *Fort Street, Finsbury* to charities. She gave a number of legacies but did not dispose of the residue either of her real or personal estate. The bill alleged that the Defendant, the heir, insisted on the invalidity of the devises to charities, and that he claimed the estates.

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The bill prayed, that the trusts of the will might be performed, and for that purpose, that all proper directions might be given and accounts taken.

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At the first hearing (13th *December*, 1856), class enquiries had been directed as to the devisees of the *Stamford Hill* property, an enquiry as to who were the heir and next of kin, the usual accounts and enquiries as to the personal estate, and an enquiry as to what the real estate of the testatrix consisted, with an account of the rents of it received by the executors.

The certificate having been made, and the Court having decided the question of construction as to the *Stamford Hill* property, the decree on further consideration, as drawn by the Registrar, proposed to declare the rights to the *Stamford Hill* property, that the devise to the charities was void and belonged to the heir, and that the residuary personal estate belonged to the next of kin; and it proceeded to direct that all the costs should be taxed, and "be apportioned between the testatrix's residuary personal estate, and the 'real estate devised to charity,' according to the several values thereof respectively," and it ordered payment accordingly.

A motion was made on behalf of the heir-at-law to vary the minutes of the decree.

Mr. *Selwyn* and Mr. *Johnson* for the heir-at-law, argued, that the personal estate was primarily liable for the costs of administration, and, at all events, that the *Stamford Hill* property, which had occasioned the principal part of the litigation, ought to bear its share of the burthen of costs. They also argued, that the real estate devised to charity could not be said to be undisposed of,

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of, as the testator had expressed an intention to devise it, which devise, by law, had enured to the benefit of the heir. They cited *Eyre v. Marsden* (a).

Mr. *Lloyd* and Mr. *Hardy* for the next of kin.

Mr. *R. Palmer* and Mr. *R. Moore* for the Plaintiff.

Mr. *Follett* and Mr. *Boys* in the same interest.

Mr. *Shebbeare*, for the executors, argued that the descended estates ought to bear the costs of litigation so far as it related to the real estate. He cited *Howse v. Chapman* (b).

The MASTER of the ROLLS reserved judgment.

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The MASTER of the ROLLS.

Apr. 16.

I have considered the case and looked into the authorities on the subject, and I find nothing to induce me to think that the minutes are incorrect in making the real estate bear a portion of the costs. Here is personal estate but no residuary bequest, and there is also real estate, with some trust to be performed, and it happens, that a portion of the real estate is undisposed of. The Court, at the hearing of the cause, considered (and I think correctly) that the costs of the administration of the personal estate should fall on the personal estate ;

(a) 4 *Myl. & Craig*, 245 ; and *Kay & J.* 426 ; *Wilson v. Squire*,  
 see *Ripley v. Moysey*, 1 *Keen*, 13 *Sim.* 212.  
 578 ; and *Pickford v. Brown*, 2 (b) 4 *Ves.* 542.

estate; but that those which related to the real estate should fall on the real estate. Falling on the real estate, it falls on that portion what is not specifically disposed of by the will, and which is that portion which is not devised at all. Mr. *Selwyn* felt the difficulty when he argued that the heir-at-law must be treated, as to the lands devised to charities, as exactly in the same situation as a devisee, because the will contained a devise, which was void only as against the heir, under the Statute of Mortmain. But the effect is precisely the same as if the devise to charity had been omitted altogether from the will, the rest being specifically devised; it is that residue, therefore, which must bear all the charges which properly fall on the real estate, that is, so far as the real estate is concerned, it must bear those charges.

Being of opinion, that so far as the suit was for the administration of trusts of the real estate, the costs must fall on real estate, it must fall on that part not specifically devised, that is, on the portion which is undisposed of and descends. I therefore think that the minutes are right.

Mr. *Selwyn*: The minutes throw the costs rateably according to the values.

*The MASTER of the ROLLS*: What ought to be done is this:—The costs of the administration of the personal estate should fall on the personal estate, and the costs of administering the real estate ought to fall on that portion of it which has descended to the heir-at-law.

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EXTRACT FROM DECREE.

Order, taxation of all the costs, and direct the Taxing Master "to distinguish the amount of the costs, if any, which appertain to the execution of the trusts of the real estate, and the amount of costs, if any, that appertain to the administration of the personal estate." Direct payment of the former out of the personal estate, and the latter by the heir-at-law.

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## LANGSTAFF v. NICHOLSON.

Feb. 12, 13.

A. agreed to sell an estate to B. for 3,000*l.*, "and the further sum of 20 per cent. on any sum the property might realize above that sum at the sale by auction advertised to take place" the next day. B. withdrew the estate from the sale. Held, that the contract was sufficiently certain, and might be enforced.

An estate, on which there were two equitable mortgages, was ordered to be sold, and the produce divided according to their priorities, which, however, were not declared by the decree. Afterwards, the second mortgagee instituted a second suit, claiming priority over the first, upon a

title paramount to that of the mortgagor, which was discovered in the first suit. Held, that a bill of revivor was unnecessary, and relief was given in the second suit.

Where a contest existed between equitable mortgagees as to priority, and a question arose whether the one who had the title deeds would be bound to give them up, the difficulty was removed by ordering a sale, and all parties to concur therein, reserving the rights of the parties as against the purchase-money.

IN 1840 the testator, Mr. *William Seagrim* the elder, by his will gave two legacies of 1,500*l.* each, in trust, as to one for his daughter the Plaintiff, Mrs. *Langstaff*, and her children at her decease, and as to the other, for his daughter Mrs. *Gillum* and afterwards to her children. The testator also devised his freehold and leasehold estate at *Lymington*, and the residue of his real and personal estates to his sons *William*, *George* and *Charles*.

The testator made a codicil, and died in 1843, and his will was proved by his sons *William* and *Charles*. On the deaths of *William* and *George*, *Charles* became entitled to the real estate devised by the testator's will. In 1850, *Charles* deposited the title deeds of the *Lymington* property with his bankers, and signed a memorandum of deposit for securing to them the moneys then due and further advances to the extent of 2,000*l.*

In 1853, *Charles* signed a memorandum, whereby he authorized the bankers to hold the title deeds, after payment of their own mortgage, for securing the two legacies of 1,500*l.* to his two sisters, which still remained unpaid.

In

## DATES.

|                            |                              |
|----------------------------|------------------------------|
| 1840, will.                | 1853, charge for Plaintiffs. |
| 1842, contract.            | 1854, first suit and decree. |
| 1843, death.               | 1857, second suit.           |
| 1850, mortgage to Bankers. |                              |

In 1853, *Charles* became bankrupt, and in 1854 the bankers instituted their suit of *Wickham v. Nicholson* against the assignees and the Plaintiffs *Mrs. Langstaff* and *Mrs. Gillum*, and against the Plaintiff *Sydney Gillum* her son and others, to enforce their equitable mortgage.

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By the decree made in *Wickham v. Nicholson* in 1854, the Master of the Rolls declared, that by virtue of the deposit of title deeds and memoranda of assignment, dated the 28th of *December*, 1850, and the 12th of *January*, 1853, the bankers were entitled to an equitable charge on the hereditaments and premises in the deeds and memoranda mentioned. And it was ordered, that the following accounts should be taken:—  
 1. An account of what was due to the bankers, for principal and interest, in respect of the mortgage securities, distinguishing in such account the amount due to them as trustees for *Mrs. Langstaff*, *Mrs. Gillum* (since deceased), *Walter Bailey* and *Sydney Gillum* respectively. 2. An account of what was due to some other incumbrancers. 3. And it was ordered that the said hereditaments and premises should be sold; and that the money to arise by the said sale should be applied in payment of what was due to the incumbrancers, according to their priority. And in the meantime, it was ordered that the same should be paid into Court. Further consideration was reserved.

The present suit was instituted in *January*, 1857, by *Sarah Langstaff* and *Sidney Gillum* against the assignees, the bankers and others. It alleged, that at the date of the decree in *Wickham v. Nicholson*, it was supposed that the beneficial interest in the *Lymington* property had passed under the devise in the will of *William Seagrim* the elder; but that since the date of the decree, the assignees

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nees of *Charles Seagrim* had produced an agreement or contract, dated the 10th of *August*, 1842, which was made between *William Seagrim* the testator of the one part, and *Charles Seagrim* of the other part, and thereby it was agreed as follows:—*William Seagrim* agreed to sell and *Charles Seagrim* agreed to purchase the property at *Lymington* “at the price or sum of 3,000*l.* clear of all and every expense, and the further sum of twenty per cent. on any sum the property might realise above that sum, at the sale by public auction advertised to take place at the *Angel Inn, Lymington*, on Thursday, *August* the 11th, 1842.” The fixtures in the several houses to be taken at a valuation in the usual way, and the amount thereof, with the sum of 3,000*l.*, to be paid on or before the 1st day of *January* then next, and interest at the rate of 2*l.* 10*s.* per centum to be paid to *William Seagrim* on the sum of 3,000*l.* from *Michaelmas* then next to the 1st of *January*. *William Seagrim* to receive the rents of the property up to *Michaelmas* then next, and a deposit of 5*l.* per centum to be paid on the signing of the agreement; *William Seagrim* to pay all out-goings up to *Michaelmas* then next, and, on receiving the remainder of the purchase money, interest, and the amount of the fixtures, to execute a conveyance or assignment to *Charles Seagrim*, free from all incumbrances.”

The bill stated, that the property comprised in the agreement was not put up for sale by public auction at the *Angel Inn, Lymington*, on the 11th day of *August*, 1842, or at any other time, *Charles Seagrim* having withdrawn it from the proposed sale, and no price higher than 3,000*l.* agreed to be paid by *Charles Seagrim* was ever bid for it.

It insisted, that *William Seagrim* the elder had, previously

viously to his decease, ceased to be the beneficial owner of the property at *Lymington*, and that the same had been purchased by, and become the property of *Charles Seagrim*, subject only to the payment by him of the purchase money of 3,000*l.* and interest.

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That under the circumstances aforesaid, the purchase money and interest were still charged on the property, which was subject to a lien for the same, and that such purchase money and interest formed part of the outstanding personal estate of the testator *William Seagrim* the elder, and was applicable for the payment of the Plaintiffs' two legacies. It also alleged, that the purchase money was the only part of the testator's personal estate now outstanding and unapplied, and that there was no other part of his personal estate remaining applicable for the payment of the Plaintiffs' legacies.

The bill prayed accounts, and a declaration, that notwithstanding the former decree, the property was charged with the purchase money, and that such charge had priority over the bankers' claims. That the agreement might be specifically performed by the assignees, and in default of payment, that the property might be sold for payment of the Plaintiffs' legacies. The agreement of 1842 was proved, it had never been carried into execution, but *Charles Seagrim* had entered into possession of the property and retained it without paying any portion of the purchase money.

It appeared that Mr. *Sanger* was the solicitor of the Plaintiffs in *Wickham v. Nicholson*, and also for Mrs. *Langstaff* and *Sidney Gillum*, who were Defendants in that suit and Plaintiffs in the present. The agreement of the 10th of August, 1842, was scheduled to the



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answer of the assignees and was produced, but no notice was taken of it until, upon proceeding to a sale under the decree, it was brought to the attention of the conveyancer, who raised the point now brought forward by the present suit.

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *W. W. Cooper* for the Plaintiff.

Mr. *Lloyd* and Mr. *Money* for the bankers. 1st. The contract is invalid, and could not have been enforced in consequence of the uncertainty, the price being undefined; *Agar v. Macklew (a)*. The purchase money was to be 3,000*l.*, plus twenty per cent. on the sum realised at the sale by auction; and it is stated in the bill that the sale was withdrawn by *Charles Seagrim*, who thereby prevented the price being ascertained. It was a conditional and not an absolute contract; the price was never, in fact, ascertained, and cannot now be ascertained. 2nd. The purchase money constituted assets in the hands of *Charles* the executor, and he may have duly applied the amount. 3rd. The legatees accepted a mortgage on the estate as a security, and therefore they cannot now have recourse to the purchase money. 4th. The present Plaintiffs, by their solicitor, Mr. *Sanger*, had notice of the contract of 1842 in the other suit, and they ought to have relied on it, and cannot now obtain a decree in the present suit inconsistent with that in *Wickham v. Nicholson*. But supposing the contract to have been unknown until after the former decree, then this is a bill of review on discovery of new matter, and cannot be maintained without

(a) 2 *Sim. & S.* 418.

without special leave to institute it. 5th. The bankers have taken their security in ignorance of the existence of this contract, and they are entitled to priority over the Plaintiff, for the equities between them are not equal; the bankers have not, it is true, the legal estate, but they have that which is next in point of value, namely, the title deeds, and they advanced their money without notice of the prior contract; under such circumstances, the title deeds cannot be taken away from them; *Rice v. Rice* (a); *Sug. Vend. & Purch.* (b).

The following cases were also referred to:—*Evans v. Bicknell* (c); *Colyer v. Finch* (d); *Mackreth v. Symmons* (e).

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*The MASTER of the ROLLS*, stopping the reply, said : Feb. 15.

With respect to a large portion of this case, I am in favour of the Plaintiffs, but I am a little embarrassed with respect to the form of decree which I ought now to make.

With respect to the agreement itself, I have no doubt that it was entered into and executed at the time it bears date. I am also of opinion, that there is nothing in the agreement itself to make it void by reason of any uncertainty arising from the clause, that the price was to include a "further sum of twenty per cent. on any sum the property might realise" above 3,000*l.* "at the sale by public auction, advertised to take place at the *Angel Inn, Lympington*, on Thursday, *August* the 11th, 1842." I see no reason whatever to doubt the validity of an agreement, if such be the construction of it, where one person

(a) 2 *Drew.* 81, 82.

(b) *Page* 562 (13th ed.)

(c) 6 *Ves.* 173.

(d) 19 *Beav.* 500, and 5 *House of Lords Ca.*

(e) 15 *Ves.* 329.

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person sells to another an estate for 3,000*l.*, and says, "If you sell that estate within a year, or on a particular day, and you obtain more for it, then, besides the sum you gave me, you shall give me one-fifth part of the additional sum of money that you receive," there is nothing in that species of contract which renders it void in itself, or void by reason of any uncertainty or difficulty in carrying it into effect. Here there was an absolute sale at all events for 3,000*l.*, to be paid in *January* next, and there was no difficulty in carrying it into effect. I am of opinion that this latter clause was merely conditional in this sense, that the vendor says, "If you sell it to-morrow for more than 3,000*l.*, you must pay me twenty per cent. upon the additional sum that you receive." But it left it entirely in the power of the purchaser, either to sell or not as he pleased or might think fit upon that occasion, and the property not having been sold, I see nothing in the form of the contract which invalidates it.

I felt some difficulty upon another part of this case, as it was first stated, namely, as to whether a bill of review ought to have been filed; but upon looking to the form of the decree in *Wickham v. Nicholson*, I do not see that anything was determined in that suit which is inconsistent with the present, or which renders it necessary for the Plaintiff in this suit, who was the Defendant in the former one, to obtain the leave of the Court to institute a suit for the purpose of setting aside that decree. In point of fact, this claim might possibly have been raised before me in chambers under that decree, and the former point might have been raised, but I doubt whether it could have been effectually disposed of without some proceeding for the purpose.

I feel the observation made on behalf of the assignees,  
 that

that if the parties to the former suit had notice of this agreement, which at present appears to me to be the case, they ought to have brought it forward on that occasion, and have taken some proper steps for that purpose ; and it would be a strong thing to subject the bankers to the vexation of two suits without providing for the costs of one of them.

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The case is certainly very meagre and bare on the evidence, and I am not at all satisfied with respect to the course of proceeding in this matter. I am, however, disposed to think (subject to what I may hear in reply), that I ought to declare, that the Plaintiffs have a lien on this property for the unsatisfied purchase money ; then to direct it to be sold, and the purchase money paid into Court to the credit of both causes, and order the parties to be paid according to their priorities. I should leave it open to the bankers to bring forward before me in chambers any case which they might have, with respect to the particular dealings with the bankrupt as to this property. There is this, undoubtedly, to be said upon that subject, that it is a very dangerous practice, to allow a Defendant, who has neglected to bring forward his case at the proper time, to do so at a future period ; but here the same observation is, in some degree, applicable to both parties. I am not satisfied, unless I made a decree of the description I have stated, that I could, without providing for their incumbrance, take away these title deeds from the bankers, who advanced their money upon them *bonâ fide* and without a suspicion of any prior incumbrance. However, I will hear Mr. *Palmer* in reply as to these points.

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Mr.

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Mr. *Palmer* replied, and a discussion then took place as to these matters, after which,

*The MASTER of the ROLLS* said :—The proper thing to do will be to leave everything open to the Plaintiffs. I will make a decree, that the Plaintiffs are entitled to a lien in respect of the unpaid purchase money, and that the agreement must be specifically performed; I shall then order the estate to be sold and the purchase money paid into Court in the two suits, and direct it to be applied in payment of the incumbrancers according to their priorities.

I think the person who is entitled to priority is entitled to have the title deeds delivered up under my decree; all difficulty as to the title deeds will be avoided, because all parties will be bound to concur in, and give effect to, the sale, and their rights against the purchase money will be reserved to them, so that in chambers the question of their priorities will still be left open.

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## COWLISHAW v. HARDY.

June 11.

July 16.

**T**WO brothers, *John* and *James Cowlishaw*, carried on the business of corn dealers together. They had one establishment and a common purse, and they realised a considerable property, to which they were equally entitled.

In 1832, they made mutual settlements of their property. This was effected by two deeds, dated the 3rd of April, 1832. By the first, *John Cowlishaw* conveyed to *James Cowlishaw* his moiety of the property, consisting of money, mortgages, securities and chattels, upon trust to allow him, *John Cowlishaw*, to receive the income for his life, and after his decease, to the intent that *James Cowlishaw* should retain them for his own absolute use. The deed contained a power of revocation by deed attested by two witnesses.

By a similar deed *James Cowlishaw* conveyed his moiety to *John*, *mutatis mutandis*, in a similar manner.

*John Cowlishaw* died intestate in 1838, without having, in any way, exercised his power of revocation; his

be made in consideration of the mortgage money. *C.* never paid the consideration, but alleged that *A.* intended a gift to him. Held, that there was no revocation, and that either the mortgage or the consideration money was still subject to the settlement.

In a suit by the next of kin of *John*, against the representatives of *James*, to recover *John's* estate, voluntary payments which had been made to the Plaintiffs by the representatives of *James*, out of his estate, under verbal directions given by him, were held not to be a satisfaction, *pro tanto*, of the Plaintiff's right to *John's* residuary estate, or to be capable of being set off against the Plaintiff's demands.

Property was settled by *A.* with power for him to revoke the settlement by deed. *A.*, by a deed which did not profess to execute the power, conveyed the property to his nephews beneficially. Held, that the deed operated as a revocation.

Affidavits held inadmissible to control the operation of a deed.

*A.* settled mortgages on himself for life, with remainder to *B.*, with a power of revocation by deed. *A.* transferred the mortgages to his nephew *C.* by a deed, expressed to

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his brother *James* then became entitled to his brother's moiety of the property.

In *September*, 1839, *James Cowlishaw* by deed conveyed several mortgage securities, amounting to 7,000*l.* (being part of the joint property), to the Defendants his nephews, *James* and *Joseph Hardy*, upon trust for themselves and other nephews and nieces.

*James Cowlishaw* died in 1844, having bequeathed all his property to the Defendants *James* and *Joseph Hardy*. Prior to his death, he gave them verbal instructions to pay, out of the property they would derive from him, to the Plaintiffs *James* and *Joseph Cowlishaw* and to the Defendant *John Cowlishaw* 2,000*l.* each, in addition to the provision made for them by the deed of *September*, 1839, and 800*l.*, and an annuity to their sister (a co-Plaintiff in this suit).

Except by the deed of *September*, 1839, and the transfers presently mentioned of the 12th of *February*, 1839, *James Cowlishaw* never executed his power of revocation. The result of which was that on the death of *James* the reversion of his property settled by the deed of 1832, so far as no revocation had taken place, fell into the estate of *John*, and became divisible amongst the Plaintiffs and the other next of kin of *John Cowlishaw*.

After the death of *James*, the Defendants, the *Hardys*, acting on his verbal instructions, paid the three sums of 3,000*l.*, and the 800*l.*, and the annuity to the *Cowlishaws*.

This suit was instituted by the Plaintiffs, three of the  
next

next of kin of *John Cowlshaw*, for the administration of his estate, and at the hearing in 1855 accounts and inquiries were directed. The Chief Clerk, by his certificate, found about 16,000*l.* to be the value of the property settled by each of the brothers, the particulars of which he specified.

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Mr. *R. Palmer* and Mr. *Faber* for the Plaintiffs now argued that the whole 16,000*l.* was divisible amongst the Plaintiffs and the other next of kin of *John Cowlshaw*.

Mr. *Lloyd* and Mr. *Smythe* for the Defendants, the *Hardys*, insisted that the deed of *September*, 1839, operated as a revocation, to the extent of 7,000*l.*, and that half of it ought to be deducted from the 16,000*l.* prior to the division amongst the next of kin. Secondly, that the payments made by the *Hardys* of the three sums of 3,000*l.* and of the 800*l.* to the *Cowlshaws*, in pursuance of the verbal direction of their uncle *James*, was a satisfaction, *pro tanto*, of the amount coming to them as next of kin of their uncle *John*.

*The MASTER of the ROLLS.*

On the death of *John*, *James* might, if he pleased, have revoked the deed settling the reversion of his own property on his brother *John*, but he never in express terms did so, and the result was, that upon *James*' death his reversion went to and formed part of *John*'s estate. I made a decree to that effect and certain inquiries were directed. The Chief Clerk has made a certificate, in which he finds the amount of this property to be about 16,000*l.*, of which the Plaintiffs would be entitled to a fourth.



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fourth. On the part of the Defendants it was, however, contended, that the payments of 2,000*l.* to *James* and a like sum to *Joseph*, and 800*l.* to *Sarah*, must be treated as a satisfaction of the claims made by them to a share of *John's* estate, of which *James's* reversion formed part. It appeared that after *James* had made his will, by which he gave the whole of his property to the Defendants, the *Hardys*, who were his nephews, he gave them certain verbal directions to make certain payments out of his property to the Plaintiffs, and under which, two of the Plaintiffs have received 2,000*l.* each, and another of them has received 800*l.* and an annuity. I do not enter into the question whether the *Hardys* could have been compelled to pay this money or not, but having paid it, I am satisfied that it cannot be treated as a payment in respect of *John's* estate, because it was a payment in respect of and on behalf of *James's*. I cannot, therefore, hold that the Defendant can set off these payments, or that the payments can be treated as a satisfaction for that to which the Plaintiffs are entitled out of the estate of *John*, such payments having been directed by *James* to be paid out of his own estate, and having been so paid accordingly.

The next question is on the deed of 1839, which is stated to have been executed with the formalities required for the revocation of the deed of 1832, it being under seal and attested by two witnesses. It does not profess to be a revocation of that deed, but still I do not think that material, if, in point of fact, it specifically and in terms disposed of the property included in the deed of 1832, which would otherwise, upon the death of *James*, have gone to *John's* estate. I should be of opinion that *James* having specifically disposed of that property in a particular manner, by

a deed which, though not professing to be a revocation, actually did dispose of it, it could not afterwards be treated as passing to *John* under the deed of 1832, and as forming part of his estate. The Chief Clerk's certificate is therefore erroneous if it finds that this particular property formed part of the estate of *John*, because it had been disposed of by *James* previously to his death and did not form part of *John's* estate.

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Mr. *R. Palmer* then argued that *James* being entitled absolutely to half of the property must be deemed to have taken the 7,000*l.* from the portion which belonged to himself, for the deed of *September*, 1839, contained no indication of his intention to deal with his brother's moiety.

*The MASTER of the ROLLS.*

I understand that *James* dealt with the specific property included in the deed of *April*, 1832, and I think that this would be a revocation *pro tanto*. For instance, supposing a mortgage of 2,000*l.*, belonging equally to the two brothers, had been settled by them by the deeds of *April*, 1832, and that in 1839, *James*, after the death of *John*, had settled that mortgage of the 2,000*l.* on his nephews. I should hold that 1,000*l.*, *James's* share in that mortgage, did not, upon his death, go to *John's* estate, although the share of *James* in the whole fund settled might be very much greater than the 2,000*l.*

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Another

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Another point arose out of these circumstances :—

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*James Cowlishaw* also executed three several deeds of lease and release, dated respectively the 11th and 12th days of *February*, 1839, by which he purported, in consideration of the payment to him, by the transferees, of the amounts of the mortgage debts, (but which it was admitted had never been paid by them,) to transfer to the Defendants *James Hardy* and *Joseph Hardy* a mortgage security, dated the 25th of *July*, 1834, for 3,000*l.*, a second mortgage security dated the 30th *March*, 1820, for 5,000*l.*, and two other mortgage securities dated the 6th *July*, 1826, and 25th *December*, 1826, for the several sums of 2,600*l.* and 400*l.* These formed part of the property settled by the deeds of *April*, 1832. The Defendants, the *Hardys*, alleged that these transfers were, in fact, absolute gifts to them, though no consideration was ever paid for them.

In support of this claim, *Joseph Hardy* made an affidavit, in which he stated, that “although the three several deeds purported to be absolute transfers of mortgage securities, in consideration of the amounts of the respective mortgage debts, yet, in fact and in truth, they were gifts from their uncle *James Cowlishaw* to him and his brother *James Hardy*.”

*John Curzon*, who prepared the transfers, also made an affidavit, in which he stated, that “the reason why the three several deeds of lease and release were prepared and executed in their present form was, because *James Cowlishaw* was desirous of giving the mortgage securities and the money due thereon to *James Hardy* and *Joseph Hardy*, for their own use and benefit, and he instructed deponent to prepare the deeds, as an  
absolute

absolute donation and free gift of the mortgage securities and the moneys due thereon to *James Hardy* and *Joseph Hardy*, for their own use and benefit, without any trust or reservation whatsoever."

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Mr. *Lloyd* and Mr. *Smythe* argued, that the transfers of 1839 were revocations of the deed of 1832, and they read, *de bene esse*, the affidavits of *Hardy* and *Curzon* as to the intention of *James Cowlishaw*.

July 15.

[*The MASTER of the ROLLS* held, that so far as the affidavits sought to control the deed they were inadmissible.]

They then argued that this was a dealing with the property inconsistent with the trusts of the deed of 1832, and that *James Cowlishaw* must be held to have thereby executed the power of revocation. That it was a declaration that the property was no longer subject to the trusts of the deed of 1832. They cited *Hales v. Margerum* (a).

*The MASTER of the ROLLS.*

I do not think that this transfer of *February*, 1839, operates as an execution of the power of revocation contained in the deed *April*, 1832.

July 16.

*James*, on the death of *John*, did not, as he might have done, exercise the power of revocation contained in his deed and so vest the whole of the reversion of his own property in himself, but he allowed that reversion to remain vested in his brother's representatives. So far

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as

(a) 3 *Ves.* 299.

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as he actually disposed of the property during his life, I thought that the deed of *September*, 1839, operated as a revocation, *pro tanto*, of the settlement of 1832. But here there is a mere transfer to other persons of the mortgages, one-half of which was settled on himself for life, with remainder to his brother absolutely. Either the transferees paid the consideration for it or they did not; if they did pay, then the money is subject to the trusts; if they did not pay for it, then the property is subject to the trusts.

It would have been very simple for him, if he meant to say, I intend that this property which was settled by the deed of *April*, 1832, should be vested in my nephews, to have conveyed that property to them; but that is not so; on the contrary, he makes it in the form of an exchange for money, that is a mere transfer of the mortgages, upon paying the full consideration.

I am of opinion, therefore, that these deeds of *February*, 1839, do not operate as an execution of the power of revocation contained in the deed of *April*, 1832.

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AMELIA DAVIES, by her next Friend,

v.

HODGSON and Others.

Feb. 15.

March 1.

THE testator, *Alexander Grant*, for many years carried on a very valuable business of a *Tobacco Broker*, on his own freehold premises at *Crutched Friars*. He was actively assisted by his brother *Wm. Grant*, but it was a question in the cause in what capacity he acted. The Plaintiff insisted that *Wm. Grant* was merely a clerk to the testator, but the Defendants alleged that he was a partner. It was, however, beyond contest, that the business had been carried on under the style or firm of *A. and W. Grant*, and that to the world, *Wm. Grant* had acted as partner, and one of the witnesses stated, that "he signed cheques and contracts, when requisite, and superintended the clerks and the conduct of the establishment, and acted as a partner in every sense of the word."

This

DATES.

1839, death of testator.	1854, <i>George</i> attained 25.
1840, sale of house.	1854, <i>William G.</i> died.
1843, investment in railway.	1855, bill filed.
1850, Plaintiff complained.	

The goodwill of a tobacco broker, whose brother had been actively engaged in the business and survived him, and continued the business, held to be valueless.

Whether a *feme covert* can, in respect of her separate estate, consent to a breach of trust, *quære?*

The Plaintiff, a *feme covert*, was, from the death of her father in 1839, entitled to maintenance out of his estate, and to a share of the residue in 1854, when her youngest brother attained twenty-five. In 1843, the executors, in breach of trust, and without her previous knowledge, invested the residue in railway securities, and a considerable loss occurred. The Plaintiff soon after the investment heard of it, and complained of it in 1850, but took no proceedings until 1855, after the death of her uncle, an executor, from whom she had expectations, and whom she was unwilling to displease. Held, that she was not bound by laches or concurrence.

A *cestui que trust* having, with knowledge, received the income from an improper investment, was held bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund.

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This being the relative position of the two brothers, the testator, *Alexander Grant*, made his will in 1836, whereby he gave his widow an annuity, and after reciting that it was shortly his intention to enter into a partnership deed with his brother, *Wm. Grant*, he devised and bequeathed all that his freehold estate and premises, situate and being No. 42, *Crutched Friars, London*, and wherein he then carried on his business of a tobacco broker, and all the rest, residue and remainder of his real and personal estate, unto his brother *William Grant*, his sons in law *Charles Davies* and *John Hodgson*, and to *Frederick Boulton*, their heirs and assigns, upon trust to receive the rents, interest and dividends arising therefrom, and pay the same into the hands of his wife, or otherwise, in their discretion, to appropriate so much thereof as would amply provide for the suitable support, maintenance, education, clothing and bringing up of all his children, until the youngest child should attain the full age of twenty-five years, if a son, when he directed them to sell all his estate and effects of every description, and when converted into ready money, he gave and bequeathed the same unto his seven children, share and share alike, the shares of his daughters to be for their separate use, independent of any husband. There were other limitations over, in case of death under twenty-five, which it is unnecessary to mention. He appointed the same four persons trustees and executors of his will and guardians of his children. The will contained no power to invest on any particular securities.

The testator died in *August*, 1839, leaving his seven children surviving him, of whom the Plaintiff *Mrs. Davies*, one of his daughters, had married in the testator's lifetime. The will was proved by the four executors, who made large payments for the maintenance, &c.,
of

of the children until *September*, 1854, when *George*, the youngest, attained twenty-five.

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William Grant died in 1854, and this bill was filed in *February*, 1855, by *Mrs. Davies*, against the representatives of *Mr. Grant* and the three surviving executors and trustees of the testator, to obtain her share of the testator's estate. There were two special grounds of complaint. First, she sought to charge the Defendants for great losses which had happened by their having improperly invested the testator's estate in railway securities; and, secondly, she claimed a share of the profits of the testator's business, carried on after his death with his capital, and of the value of the "goodwill" thereof.

As to the railway shares, the following were the circumstances:—The executors and trustees realized the testator's estate and invested the produce in 38,143*l*. Three and a-half per Cents. In 1843, and in subsequent years, they sold out the whole of this fund and invested it in the purchase of railway shares and railway securities, and thereby a considerable loss was ultimately sustained.

The executors stated, that this had been done with the full knowledge and concurrence of the Plaintiff *Mrs. Davies*, and that she was aware of the investments and approved thereof, in order to get a greater income. It did not, however, appear that she had even been consulted as to the investments or had given any preliminary sanction to them, but she admitted, on cross-examination, that fourteen or fifteen years ago she had been informed, and first heard, that part of her father's moneys had been invested in railway shares. She, however, complained in 1850, when the railway investments had

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become depreciated, and had expressed her wish to have them realized, but she took no steps in the matter, having expectations that her uncle would, by his will, make a provision for her and children and fearing to displease him.

As regarded the good-will, no attempt was made to sell it on the testator's death. *William Grant*, his brother, claimed it as surviving partner, and on the death of the testator, in *August*, 1839, *William Grant* continued to carry on the same business on his own account until the end of the year, when he took *John Hodyson* (the other executor) into partnership. They carried it on at the testator's house in *Crutched Friars* (paying a rent to the estate) down to the latter part of the year 1840, when the premises having been taken compulsorily by the *London and Blackwall Company*, Mr. *Grant* and *John Hodyson* removed to new premises in *Fenchurch Street*, and there continued to carry on their trade. Some part of the testator's assets had been continued in the business.

As to the value of the good-will of the business, one witness, Mr. *Ball*, said, that "the good-will of this trade or business mainly depended on the credit and connections of the house in trade, the extent of the capital employed, and its capability of affording pecuniary facilities to its customers." He thought a considerable sum might have been obtained "provided that the concern with its connection could have been transferred to a successor by purchase." But, in his cross-examination, he said, "supposing that Mr. *William Grant* had been acting as a partner from 1833 down to *August*, 1839, he would have been a necessary party to the transfer of the business to a purchaser; for a purchaser would not have been content to have allowed him to carry on the business of a tobacco broker after a sale; he would have

have been compelled to relinquish that business altogether, or not to carry it on within a certain distance. Such a business (he said) could not have been substantially transferred to a purchaser without such a covenant on his part; the business could not have had any saleable value without such a covenant; the very essence of such an arrangement would be, that the original owners of the business should divest themselves of the right to carry it on after a sale, and the purchaser would have been entitled to a covenant precluding *William Grant* practising anywhere in London."

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Another witness, Mr. *Williams*, a tobacco broker, and who had been clerk to the testator and knew the business, said: "The business of a tobacco broker is to buy and sell tobacco on commission. It depends upon the knowledge of the business and the consequent knowledge of the articles and personal exertions. It depends mainly upon the personal knowledge and exertions of the party carrying on the business, and I should say that such a business was not a saleable business."

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Collins* for the Plaintiff. The executors, having invested the trust moneys without authority, have committed a breach of trust, and are responsible for the loss. The investment, at the first, was unauthorized by the Plaintiff, and her subsequent knowledge did not release the Defendants from their existing liability.

Secondly, as to the testator's assets employed in the trade, the Plaintiff has the option either to have the share of the profits or 5*l.* per cent.; *Jones v. Foxall* (a).

Thirdly,

(a) 15 *Beav.* 388.

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Thirdly, the good-will of the trade belonged to the testator's estate. It ought to have been sold; instead of which, two of the executors and trustees have taken the benefit of it; they must, therefore, account for the value; *Wedderburn v. Wedderburn* (a); *Gibblett v. Read* (b); *Crawshay v. Collins* (c).

The MASTER of the ROLLS.

Feb. 15. As regards the question of good will, I think, upon the evidence, that it was worth nothing in this peculiar business, and that it is immaterial, for the present purpose, to consider, whether Mr. *William Grant* was a partner or not. I thought that Lord *Eldon* had determined the point in *Cook v. Collingridge*, and find from the decree in that case, which is stated at length in Mr. *Collyer's* book (d), that Lord *Eldon* expressly states, that after a sale, the partners would be at full liberty to carry on the same trade and business, and that those who buy the good-will buy it with full knowledge that it is liable to the chance of the partners not retiring from trade and carrying off the customers of the old establishment. The passage is very distinct on the subject: it is said,—“And his Lordship did declare, that no Court could prevent the late co-partners from engaging in the same business, and therefore the sale thereof could not proceed on the same principles as if a Court could prevent their so engaging. And his Lordship did declare, that, in that case (as it appeared to the Court to be circumstanced) the said valuation or estimation was or could only be that which every bidder, according

(a) 22 *Beav.* 84.

(b) 9 *Mod.* 459.

(c) 15 *Ves.* 218; 1 *Jac. & W.*

267, and 2 *Russ.* 325.

(d) *Collyer on Partnership*, p.

174.

according to his own speculations, could fancy to be worth of his chance of retaining the old customers and their not following the old partners or any of them into a new establishment."

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Mr. *Follett* :—But these executors might have put up the good-will for sale and obtained what it was worth.

The MASTER of the ROLLS :—Here Mr. *Ball* says this good-will was worth nothing, unless *William Grant* covenanted not to carry on the same business, and the other evidence leads very much to the same conclusion. It is obvious, in this case, that if *William Grant* were a partner, *Cook v. Collingridge* directly applies, for it expressly decides, that a surviving partner cannot be prevented from carrying on the same business. But if he be not a partner, *a fortiori* it is impossible to prevent him carrying on the business.

Besides this, *William Grant*, having been held out to the public as a partner, and thereby rendered liable to all the debts of the concern, it might have been questionable whether if the good-will had been sold, he would not have been entitled to a share. But it is not necessary to enter into that. It is clear that the testator did not consider, as between himself and Mr. *William Grant*, that Mr. *William Grant* was a partner, because, in the will, he expressly states his intention to make him a partner, though at that time he held him out to the public as a partner. As that question can only be material in respect to the the good-will, and as, from the peculiar nature of the business, Mr. *William Grant* would have been required, upon a sale, to enter into a covenant that he would not carry on the same business, which he was not bound to do, and as it would,
 even

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even in that event, have been only worth about one year's purchase, I am of opinion that I cannot, at this time, fix the Defendants for the value of any species of good-will, or require that it should now be put up for sale, which would only occasion an unnecessary expense.

Mr. Collins.:—But here *Mr. William Grant* was not only a partner but the executor and trustee.

The MASTER of the ROLLS.:—Suppose in a case like *Cook v. Collingridge* a coach maker makes another coach maker his executor, cannot he carry on his business because he has undertaken the duty of an executor. His acceptance of the appointment as executor does not oblige him to give up his own profession or employment. I must hear the Defendants on the remaining question.

Mr. Follett for *Mr. Davies*.

Mr. Selwyn and *Mr. G. L. Russell*, *Mr. Bagshawe* and *Mr. Bagshawe, jun.*, for the executors of *William Grant* and the other two surviving executors. The Plaintiff was a *feme sole* as to her separate estate, and having concurred in the investment in railway shares, she cannot now complain. Her interest is bound by her concurrence; *Hulme v. Tenant* (a); *Fettiplace v. Gorges* (b); *Murray v. Barlee* (c); *Hughes v. Wells* (d); *Lewin on Trusts* (e); the Plaintiff is also barred by her laches and by the lapse of time; *Browne v. Cross* (f).

Mr.

(a) 1 Bro. C. C. 16.
 (b) 1 Ves. jun. 46.

(d) 9 Hare, 749, and p. 773.
 (e) Page 775 (2nd ed.)
 (f) 14 Beav. 105.

Mr. *Collins* in reply.

The MASTER of the ROLLS reserved judgment.

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The MASTER of the ROLLS.

The remaining question in this case is, whether the Plaintiff is entitled to have the share of her father's estate made good by the purchase of Stock to the amount sold out.

March 1.

The testator having made his will in 1836, died in *August*, 1839. His four executors proved the will and invested the surplus in 38,143*l.* New Three-and-a-half per Cents. In the year 1843, they sold out this amount and invested it in railway securities, and the result has been a considerable loss. The Plaintiff claims her original share of this Stock, which became payable on 24th *September*, 1854, when the testator's youngest child attained the age of twenty-five. The Defendants are the executors of Mr. *William Grant*, who died in 1854, and the other three trustees, one of whom is the Plaintiff's husband. The defence is, that the Plaintiff knew of and sanctioned the sale of the Stock and its investment in railway securities, and that having done this for a long series of years, she cannot now maintain any suit in respect of these transactions, she being, as to this property, which is settled to her separate use, simply a *feme sole*. At the hearing of this cause, it appeared to me to raise a question of very considerable importance, viz., whether a *feme covert* could consent to a breach of trust, and whether, as a married woman, being,

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being, in respect of this property, a *feme sole*, she might have authorized payment of this money either to herself or to any other person. This would include the power of authorizing the trustees either to lend the money to any one she sanctioned, or to lend it out upon imperfect and inadequate securities. It is clear that when there is a proviso against anticipation, her authority and sanction to the trustees to invest it in unauthorized securities would not be a sufficient authority to them; this is settled by several authorities. It is difficult, however, to understand the principle on which her sanction would be a sufficient authority when there is no such proviso, if it be insufficient when there is such a proviso. I can well understand, that if the authority to invest upon improper and imperfect securities is introduced as a means of forestalling the income, the proviso against anticipation would create a difference: but when this is not the case, but the desire to alter the investment simply arises from a desire to obtain a larger amount of interest, with a *bonâ fide* belief that the capital is equally secured, why should the proviso against anticipation make any difference? It is clear that the proviso against anticipation has nothing to do with the powers or duties of the trustees as to the investment of the fund: all that it does is to fetter the power of the *feme covert* of disposing of the interest of the fund thereafter to become due; but her authority (if it exist), to enable the trustees to invest it upon securities not authorized by the original settlement, would seem to be exactly the same in both cases. The fact is, that she has nothing to do with the investment; that is a part of the duties of the trustees. Her power is over the interest: over the interest after it has become due, if there be a proviso against anticipation; and over the interest now and hereafter to become due, if there be no such proviso. But the question is, whether she can or cannot
 direct

direct any alteration in the investment. Accordingly, Lord *Hardwicke*, in *Smith v. French* (a), seems to have so considered, for he uses this expression, with reference to a married woman who had a separate estate, not, as it should seem, coupled with any restraint against anticipation, "a promise by the wife to release, during the coverture, it is certain could not bind the wife." This expression is cited with approbation by Lord *St. Leonards* in the case of *Mara v. Manning* (b); and the same doctrine seems to have been followed by the Vice-Chancellor of *England* in the first decree made in the original suit of *Nail v. Punter* (c). It does not however appear whether or not there was any argument or discussion upon it. This question does not arise, whether the married woman has a power of disposing of the capital of the fund, and it must be regarded wholly apart from any consideration arising from the commission of any fraud; for a married woman (d), as well as an infant (e), may undoubtedly commit and will be responsible for the commission of a fraud, the disabilities of married women or of infants not protecting them from the consequences of so doing. But this case is wholly free from any consideration of that description.

I have not, however, gone more fully into the question, which is one of great importance, and which, so far as I am aware, has not been directly decided, because, after examining and considering the evidence in this case, I am of opinion that the point does not arise, and that the Plaintiff has not done anything here, which can be treated as an authority or a sanction for the breach of trust which was committed. The facts relative to it appear to me, upon the evidence, to be as follows:—

She

(a) 2 *Atk.* 245.

(b) 2 *Jones & L.* 318.

(c) 5 *Sim.* 557.

(d) *Vaughan v. Vanderstegen*,

2 *Drew.* 363.

(e) 3 *Hare*, 505.

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She did not know of the sale or investment in railway securities before the Stock was sold out, and she gave no preliminary sanction for that purpose. She knew it immediately before or very shortly after it was done, but she never complained of it till 1850, when the railway securities became depreciated in value in the market. Up to that time, she had received an additional sum annually, by way of maintenance, in consequence of the higher rate of interest derived from the railway securities. This, in my opinion, is quite as high as, upon the evidence, the case can fairly be put against her. But against this it must be observed, that she had no right to any share in the capital of the fund till the youngest child attained the age of twenty-five years, which was not until *September*, 1854, and that until that time she was only entitled to such a sum as the trustees might properly think fit to apply for her benefit, in the shape of maintenance. Besides this, no formal or express approbation of any such investment was ever made by her, or anything done by her more than this:—that she knew of, but did not complain of the investment. This case, in my opinion, is very distinct from *Browne v. Cross* (a). In that case *Walter Brown* was entitled to a reversion upon the death of the tenant for life, the widow. He allowed the investment to continue unaltered from the year 1812 to the year 1826, that is, for fourteen years. The Plaintiffs in that suit were his legatees, and were, therefore, bound by all his acts; they attained the age of twenty-one in 1834 and 1835, and did not file their bill till 1847, being in one case fifteen and in the other fourteen years. They sold their reversionary interest in 1839, specifying and describing the investments as they then actually stood, and received the purchase-money as for such investments.

(a) 14 *Beav.* 105.

ments. I held, that they and their testator were bound by the investment so made, that they were not entitled to disturb them, but were prevented by laches and acquiescence from any further complaint.

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Here the Plaintiff had no vested right in the money till *September*, 1854, and assuming that she might have required the fund to be properly invested, by reason of the contingent interest that she had, yet she might well abstain from taking any such course, regard being had to the fact, that the amount of maintenance was to be regulated by the mere discretion of the trustees, and that as she had no right to inquire into whether that discretion had been properly or improperly exercised; to have done so might have offended them and have prejudiced her interests. It is suggested, however, that to sanction the influence of such motives would be to sanction a fraud. In addition to this, she had heard and entertained the belief that her uncle Mr. *Grant* intended to leave her or her children money; and it is said that she abstained from complaining in order not to offend him: this also, it is contended, must be treated in the same light, and the more so as she has actually obtained the benefit what she anticipated, in the shape of a legacy, and which, if she had taken any proceedings during his lifetime, she might and probably would have forfeited.

On reading the evidence, however, I am satisfied that no case is made out that can justify any charge of fraud against her. I see a reluctance to take any active steps until the money became actually payable; but this, as I have already observed, was naturally excusable under the circumstances; and I also see, that she complained upon the subject as early as 1850, which was in the lifetime of Mr. *William Grant*, and certainly there is no evidence of any waiver or abandonment,

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ment, either express or implied, of her claim or her rights, provided or on condition that she obtained a legacy from Mr. *William Grant* either for herself or her children. In this state of circumstances, I am of opinion that she is entitled to have her share of the Stock replaced, but that she must account for, or allow in account, such amount of maintenance as she has received in excess of what the dividends would have produced, in case the Stock had not been sold out. She has received more than the dividends, and that must be deducted, because though it was a matter of discretion in the trustees what to allow, yet they, in fact, allowed this large amount for maintenance only on the supposition that these railway securities were approved of.

As to the employment of the testator's capital in the business, I will direct an inquiry as to the profits, similar to that of *Crawshay v. Collins* (a).

(a) 15 *Ves.* 218, and 1 *Jac. & W.* 267.

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ROB. H. ANDERSON v. HENRY ANDERSON.
HENRY ANDERSON v. ROB. H. ANDERSON.


June 9, 12.

This Court will not dissolve a partnership on the ground of a small infraction of the articles of co-partnership.

IN 1848, *Robert H. Anderson* a solicitor, took his son *Henry Anderson*, into partnership, and by indenture of the 22nd of *September*, 1848, they covenanted to become partners for fifteen years. The deed contained this provision, "That if, contrary to the several agreements

Articles of partnership provided, that if either of the partners should give guarantees without consent, the other might dissolve on giving notice. One of the partners, in the course of eight years, gave a guarantee for 52*l.*, and the other gave notice to dissolve. Held, that this alone was not, in equity, a sufficient ground for a dissolution.

ments hereinbefore contained, either of the partners should, to the detriment or injury of the said partnership or business, neglect or refuse to employ himself diligently therein, or should make, draw, indorse or accept any promissory note or bill of exchange, *guarantee or other contract in the name of the said partnership*, for his own private benefit or advantage or for any other purpose, without the assent in writing of the other of them," &c., &c., then and in any of the said cases, the other of the said partners, if he should think fit, should be at liberty to dissolve the said partnership, by giving to the partner who should offend in any of the particulars aforesaid a notice in writing declaring the partnership dissolved and determined, and the partnership should thenceforth absolutely cease and determine accordingly.

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Disagreements took place between the partners, and on the 16th of *May*, 1856, the son gave to the father the following notice of dissolution :—

"Take notice, that in consequence of your having broken some or one of the covenants contained in our deed of partnership, dated the 22nd day of *February*, 1848, I do hereby dissolve the partnership created by such deed and heretofore existing between us, and I do hereby declare the said partnership to be dissolved and determined from the day of the date hereof.

"Witness my hand this 16th day of *May*, 1856."

The son acted at once on the notice, and treated the partnership as wholly at an end. The father filed his bill against the son for accounts and for the specific performance of the partnership articles, and an injunction. The son filed a cross bill against the father, alleging a great number of acts on the part of the father inconsistent

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sistent with the stipulations in the partnership deed, and seeking a dissolution as from the 16th of *May*, 1856; the only one relied on by the Court was the following, and it is therefore unnecessary to mention the other minor matters :—

In *November*, 1855, an action at law was brought by *Joseph Goff* against *Thomas Wright* and *Thomas Wright* the younger, and the partnership firm were the attorneys of the Defendants in such action. The father, on the 7th *November*, 1855, without the authority, assent or knowledge of his son, and, as was alleged, in the breach of the covenant in the deed of partnership, made and signed, in the name of the partnership firm, a guarantee, whereby, in consideration of the Plaintiffs in the action consenting to stay further proceedings, he, *in the name of the firm*, guaranteed the payment, by the Defendants in the action, of three bills of exchange, accepted by such Defendants for the sums of 17*l.* 11*s.* 11*d.*, 17*l.* 6*s.* 2*d.*, and 17*l.* 4*s.* 9*d.* (making together the sum of 52*l.* 2*s.* 10*d.*)

Thomas Wright and *Thomas Wright* the younger afterwards became bankrupts without having paid the bills, and the firm became liable under the guarantee.

Mr. *Anderson* the father appeared in person in support of his bill.

Mr. *R. Palmer* and Mr. *W. Pearson* for the son.

The MASTER of the ROLLS reserved judgment.

The

The MASTER of the ROLLS.

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June 12.

The only substantial question in this suit is the period from which the dissolution of partnership is to date; both parties agree that it is useless further to attempt to carry on the partnership together, and a decree must be made declaring the partnership dissolved and to get in the assets, and to take and settle the accounts between the parties.

The Plaintiff in the original suit insists, that the dissolution should be from the date of the decree, while the Defendant in that suit insists, that it should be from the notice of the 16th *May*, 1855, there being a power in the articles, on breach of any of the covenants, to dissolve the partnership by giving notice to the other partner. Before I proceed to comment on the evidence, I think it desirable to state the principles on which the Court regards these matters.

I think Mr. Justice *Story* (a) accurately states the principle when he says, Equity will decree a dissolution of the partnership, unobjectionable in its origin, for the misconduct, fraud or violation of duty by a partner; but that under this head, it is proper to observe "that it is not for every trivial departure from duty, or violation of the articles of partnership, or for every trifling fault or misconduct, that a Court of Equity will interfere and decree a dissolution." So in *Goodman v. Whitcombe* (b) Lord *Elden* says, "Where partners differ, as they sometimes do when they enter into another kind of partnership, they should recollect, that they enter into it for better and worse, and this Court has no jurisdiction to mak ea separation

(a) *Story on Partnership*, p. 453 (b) 1 *Jac. & W.* 592.
4th ed.)

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separation between them, because one is more sullen, or less good-tempered than the other. Another Court, in the partnership I have alluded to, cannot, nor can this Court in this kind of partnership, interfere, unless there is a cause for separation, which, in the one case must amount to downright cruelty, and, in the other, must be conduct amounting to an entire exclusion of the partner from his interest in the partnership. Whether a dissolution may ultimately be decreed, I will not say, but trifling circumstances of conduct are not sufficient to authorize the Court to award a dissolution." So, in a subsequent case of *Loscombe v. Russell* (a), the Vice-Chancellor of *England* made these observations:—"With respect to occasional breaches of agreement between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the Court stands neuter; but when it finds that the acts complained of are of such a character as to shew that the parties cannot continue partners, and that relief cannot be given but by a dissolution, the Court will decree it, although it is not specifically asked."

Having stated the principles which govern these cases, I come to the facts of this case. The Plaintiff, in the original suit, took the Defendant into partnership in the year 1848, and they remained in partnership down to the beginning of the last year. The Defendant absented himself from the business, and took away some of the papers belonging to the partnership, in the beginning of *May*, 1855. On the 16th of *May*, 1856, the Defendant, alleging that he had various causes of dissolution, gave the Plaintiff notice of dissolution, on the ground, as he expresses it,

(a) 4 *Sim.* p. 11.

it, of his "having broken some or one of the covenants contained in the deed of partnership." The Defendant has since filed a cross bill for a dissolution, according to that notice, and he alleges in it several distinct breaches of the articles of partnership sufficient, as he contends, to give him a right to dissolve. I must consider whether these acts entitle him to a dissolution; for if not, it must date from the decree. The grounds as stated in the cross bill are these:—First, That the Plaintiff retained the partnership deed and did not allow him to see it. Second, That the Defendant was not allowed his share of the profits or to receive partnership moneys. Third, That the Plaintiff neglected to keep proper accounts. Fourth, That the Plaintiff carried on a newspaper and became an Alderman, and in consequence thereof, did not devote all his time to the partnership business. Fifth, That he had given guarantees for three bills, amounting together to 52*l.* 2*s.* 10*d.* Sixth, He gave other bills of exchange and compounded debts. Seventh, He retained the documents necessary to make out proper accounts. Eighth, That he treated him as a clerk and opened his private letters.

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These are all the various charges made in the bill. [*His Honor disposed of all these seriatim, except the fifth, and he came to the conclusion that they did not warrant a dissolution. He then proceeded to consider the fifth:*—

I have more difficulty as to *Wright's* guarantee, because there is a covenant that there should be no guarantee given. But this is the only instance I find of a guarantee during eight years of the partnership, and having regard to the observations made by Lord *Elden* and to the other authorities I have already

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referred to, I am of opinion, that if the case rested on this alone, and nothing further existed, it would not have justified the Court in dissolving the partnership. I am also satisfied, on the evidence, that this was not the cause of the son's seeking to dissolve. The reason for it may be clearly seen from the last of the grounds of complaint put forward by the son, viz., that his father treated him as a clerk, and not with proper respect, and that he opened his private letters. The truth is, that, after eight years, the father still continued to exercise parental authority over his son, and, unfortunately, did not see that he had grown up to manhood and had become impatient of parental control. That really is the explanation of the whole.

Upon the whole, I do not see any grounds for saying, that the partnership should be dissolved, except from this day. I will therefore make the usual decree for dissolution in the first suit, and dismiss the cross suit without costs.

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BENTLEY v. MEECH.

Feb. 16.

THE testator, by his will, devised and bequeathed the residue of his estate and effects to his two executors, in trust to sell and invest, and to stand possessed of the interest, dividends and annual proceeds thereof, and of the proceeds of all other the residue of his estate and effects, upon trust to pay the same to his wife *Ann Bentley* during her life, for her separate use; and the testator thereby requested his wife, from and out of the said dividends and proceeds, to maintain and educate his son *Charles Archibald Bentley* until he should attain the age of twenty-one years; and upon further trust, that the trustees or the trustee of his will for the time being should, if he or they thought it expedient, and the testator thereby authorized him or them, from and out of the principal stocks, funds and effects aforesaid, to advance and pay such sum and sums of money as he or they should deem expedient, not exceeding altogether the sum of 100*l.*, for the apprenticing or advancement in the world of his son *Charles Archibald*. And after these trusts, the testator's will was expressed as follows:—

“And from and immediately after the decease of my dear wife, then upon trust to pay, assign, transfer and make over the said original trust property and every part thereof, and the rents, interest, dividends and annual proceeds thereof, and of every part thereof, then due or to accrue due, and all accumulations thereof, unto my son *Charles Archibald*, on his attaining the age of twenty-one years, to and for his own use and benefit. And

Bequest of residuary personal estate in trust for testator's wife for life, and on her death to pay, &c., to his son *C. A.* on his attaining twenty-one. But if he should depart this life before the wife “or” before attaining twenty-one, then in trust for the Defendants. Maintenance to, and a power to advance *C. A.* were also given. *C. A.* attained twenty-one, but died in the wife's lifetime. Held, that “or” was to be read “and,” and that the son took an absolute vested interest on attaining twenty-one.

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I do hereby authorize my trustees to lay out and apply the interest, dividends and annual proceeds of my said estate and effects, or so much thereof as shall be necessary, in or towards the maintenance and education of my said son until he shall attain the age of twenty-one years, *but if my said son shall depart this life before my said dear wife, or before attaining the said age of twenty-one years, then* upon trust to pay, apply, transfer and divide the said trust premises and every part thereof in manner following, that is to say, one equal moiety or half part thereof unto my brother *Charles Bentley* for his own use and benefit, and the other moiety or half part thereof unto and equally between and amongst all and every my other brothers and sisters who shall be living at the time of my decease."

The testator died in 1829. His executors realised his residuary estate, which consisted entirely of personalty, and they invested it in 1,800*l.*, £3 per Cents.

The testator's son attained twenty-one in the year 1834, and died in 1853, in the lifetime of the widow, who died in 1855.

This suit was instituted by the executors of the son, claiming the 1,800*l.* £3 per Cents.

The brothers and sister of the testator, however, contended, that by reason of the death of *Charles Archibald Bentley* in the lifetime of *Ann Bentley*, the trust or gift over, in favour of the brothers and sisters of the testator living at his decease, took effect.

Mr. *R. Palmer* and Mr. *Godfrey* for the Plaintiffs, the representatives of the son, argued that the word "or" must be read "and" to accomplish the intentions of the testator.

Mr.

Mr. *Selwyn* and Mr. *Osborne*, *contra*.

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Brownsword v. Edwards (a); *Miles v. Dyer* (b);
Morris v. Morris (c); *Shand v. Kidd* (d); *Torres v.*
Franco (e); *Grimshawe v. Pichup* (f); *Hinzman v.*
Poynder (g), and *Jarman on Wills* (h), were referred to,
and see *Grey v. Pearson* (i).

The MASTER of the ROLLS.

I think that this is a case where “or” is to be turned into “and,” and that it was the intention of the testator that the gift to the brothers should only take effect in the event of his sons dying in the lifetime of the widow under age. The case of *Miles v. Dyer* appears to me to be precisely this case. I agree with Mr. *Selwyn* in the advantage of construing a will according to the plain meaning of the words, but it is also of the greatest importance not to allow the established rules of construction to be shaken, because that it is which enables persons advising testators to state to them what construction will be put upon their wills, if they should come before the Court for interpretation. I agree in the observation that the meaning of the word “or” is altered by changing the form of the sentence from affirmative into hypothetical. Thus, if you say “*A. B.* died without surviving the tenant for life or attaining twenty-one,” it means he did neither; but if you say, “if he should die without surviving the tenant for life or attaining twenty-one,” the meaning is disjunctive, and means if
either

(a) 2 *Ves. senr.* 242.

(b) 5 *Sim.* 435; 8 *Sim.* 330.

(c) 17 *Beav.* 198.

(d) 19 *Beav.* 310.

(e) 1 *Russ. & M.* 649.

(f) 9 *Sim.* 591.

(g) 5 *Sim.* 546.

(h) Vol. 2, p. 423, 425 (2nd ed.)

(i) 6 *H. of Lds. Ca.* 61.



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—
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either event should happen: this peculiarity frequently leads to a careless use of the words, and this Court has been compelled to change them accordingly. I think these words "or" and "and" convertible in all cases, when, taking the scope and object of the whole, this change carries into effect the real intention of a testator. I am therefore of opinion, that *Charles* took an absolute vested interest on attaining *twenty-one*.

COLLIER v. MASON.

Feb. 24.

The Defendant agreed to purchase a property at a valuation to be made by *A. B.* The Court, though it considered *A. B.*'s valuation very high, "and perhaps exorbitant," decreed specific performance, there appearing neither "fraud, mistake, or mis-carriage."

THE Plaintiff was the owner of a brick-built family mansion at *Old Charlton*, called "*The Firs*," standing in its own grounds of about one and three quarters acres. It was held on a lease for a term, of which eighty-four years were unexpired, subject to a ground-rent of 32*l.* 8*s.*, to a tithe rent-charge of 1*l.* per annum and to the land-tax (if any) and sewer rate; the tenant was also bound to insure to the extent of four-fifths of the value of the premises.

The Defendant having advertised for a house, negotiations were entered into between the Defendant and the Plaintiff, who in *June*, 1857, offered to grant the Defendant a lease of the house and grounds at a rent of about 200*l.* per annum. This the Plaintiff declined, and offered 2,500*l.* for the purchase of the lease, which was refused by the Plaintiff, whose wife, however, had named 3,500*l.* as the probable price.

A treaty afterwards took place between the Plaintiff and Defendant for the purchase, and after some letters
had

had passed between them, they signed an agreement, whereby it was agreed, that the Plaintiff Mr. *Collier* should sell, and the Defendant Mr. *Mason* should buy, the house and property called "*The Firs*," "at such a price or sum as should be fixed by reference to Mr. *B. A. Englehart*, auctioneer and house agent;" such valuation to include all gas and other fittings, including blinds, rollers and picture rods.

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Something was said in the correspondence as to the estimate being made on "the annual value," but this term did not appear in the contract.

On the 17th of *May*, 1857, they signed and gave Mr. *Englehart* the following written instructions as to the valuation:—"You are hereby requested to proceed to *Charlton* in *Kent*, to inspect and value the house and property known as "*The Firs*," and described as Lot No. 9 in the inclosed printed particulars, and to value the same, as between us, upon those particulars, being the lease for eighty-four years from *Lady Day* last past, subject to a ground-rent and outgoings amounting to 33*l.* 8*s.* per annum, such valuation to include the stoves, kitchen range, gas fittings, blinds, picture rods, &c. but not the gas lamp.

On the 25th of *August*, Mr. *Englehart* made his report, in which he valued the premises at 4,937*l.* 16*s.* 6*d.*, and he charged 123*l.* 9*s.* for valuing them.

The Defendant repudiated the value as exorbitant, and refused to complete his contract, and the Plaintiff, the vendor, instituted this suit for specific performance.

The Plaintiff in his affidavit stated, that the house and ground had cost him 5,200*l.*, and that he had obtained,

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tained, after a survey, a sum of 3,500*l.* on mortgage of it. It was also stated, that he had refused an offer of 3,100*l.* for it.

Two surveyors who gave testimony for the Defendant valued the premises, one at 2,634*l.* and the other at 2,838*l.*, or an average taken between them of 2,726*l.*

The Defendant had himself considered that the property ought to produce seven per cent. on the purchase money, and on that basis, assuming the rent to be 200*l.* a year, the value would be 2,380*l.*, and he had made some calculation on that foundation with Mr. *Englehart*, prior to the contract.

There were personal imputations made by both sides, but as the Court disregarded them, it is unnecessary to state them.

Mr. *R. Palmer* and Mr. *W. W. Cooper*, for the Plaintiff, argued that the contract to purchase at the valuation of a third party was valid, and that both sides were bound by his discretion. That a difference of opinion, as to the value, was not a sufficient ground for refusing specific performance, and that the parties must abide by the valuation of Mr. *Englehart*, unless fraud or gross mistake was established.

Mr. *Lloyd* and Mr. *Bush* for the Defendant. This is not such a contract as a Court of Equity will enforce. Here house property of leasehold tenure has been valued at thirty years purchase on the rental proposed by the Plaintiff himself, which is more than the value of fee simple land, and the amount fixed by Mr. *Englehart* exceeds by 2,000*l.* that of the two other valuers. When the consideration is unreasonable, equity will be

as

as vigilant in discovering an excuse for refusing to perform the contract, as where the price is inadequate (a).

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A simple agreement to sell at whatever price a third person shall name is not such as the Court would be very desirous to enforce; *Emery v. Wase* (b). Here the valuation must have proceeded on erroneous principles, and it is perfectly exorbitant. The rule is this:—that where the price is to be fixed by a third person, if such referee “do not act fairly or a valuation be not carefully made, execution of the contract will not be compelled” (c).

In *Emery v. Wase* (d), Lord *Eldon* relied on the circumstance of a difference of valuation of between 4,000*l.* and 6,000*l.*, as evidence that the valuation was not made with due attention to accuracy. In *Parken v. Whitly* (e), on a similar contract, the Court said, “If the Court were even satisfied that the price set by them (two valuers) on the property did not come near the true value, it would never interfere to enforce the performance of the contract.” Here the Plaintiff ought, as in *Emery v. Wase*, to be left to his remedy at law.

Mr. *W. W. Cooper* was stopped in his reply.

The MASTER of the ROLLS.

I cannot satisfy myself that I should be correct in saying, that this is a contract which cannot be specifically performed. It is not proved that Mr. *Englehart* did

(a) 1 *Sug. Vend.* 442 (10th ed.)
(b) 5 *Ves.* 848.

(c) 1 *Sug. Vend.* 464 (10th ed.)
(d) 8 *Ves.* 518.
(e) *Turner & Russ.* 372.

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did not exercise his judgment and discretion in the best way he could. It may have been improvident as between these parties to enter into a contract to buy and sell property at a price to be fixed by another person, but that cannot avoid the contract. Here the referee has fixed the price, which is said to be evidence of miscarriage, but this Court, upon the principle laid down by Lord *Eldon*, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one: as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract; or even, in the absence of any proof of any one of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the Court would refuse to act on the valuation. But I am satisfied that it is not so here, the price does not come up to that: one person, it is true, has valued the property at 2,634*l.* and another at 2,834*l.*, and it is said that the valuation of Mr. *Englehart* is nearly double; but I have frequently had to refer to the enormous discrepancy in *bonâ fide* valuations, when it is known by each valuer for what purpose the property is to be valued; it is impossible in such cases to avoid a species of bias. I find that 3,100*l.* was offered for the property and refused, and this is a test that the vendor did not consider that to be the value. The Plaintiff said he would not take less than 3,500*l.*, and swears that he laid out 5,200*l.* on the property exclusive of the fixtures, and the valuation is 4,957*l.* It does appear to me a very high and perhaps an exorbitant valuation, but I cannot say it amounts to evidence of fraud, mistake or miscarriage.

Decree specific performance with costs.

1857.

PERRY HERRICK v. ATTWOOD.

JOHN ATTWOOD purchased "The *Highlands* Estate" for 50,000*l.*, which was conveyed to him in 1839.

In 1848 *John Attwood* was indebted as follows:—

1. To *Hawkins'* trustees £5,000
2. To *James Alexander Attwood's* trustees (of whom he was one) . 10,600
3. To his three sisters, *Frances Attwood*, *Maria Attwood* and Mrs. *Troward*, 10,000*l.* each, making . 30,000

He had, by deeds of 1839 and 1841, covenanted to pay the first two debts, and to convey a competent part of any messuages, &c. of which he should become seised for securing them.

In 1847, *John Attwood* was pressed for payment of the first two debts, and threatened with proceedings to compel payment, and actions were actually commenced against him on the 11th of *June*, 1848. In this state of things, *Roger W. Gem*, the solicitor of *John Attwood* and of his family, voluntarily proposed to the Misses *Attwood*, who were resident with and maintained by their brother, to prepare a security for the 30,000*l.* due from him.

John Attwood, without being in any way pressed by his sisters for payment or security, acquiesced in this, and Mr. *Gem* prepared a mortgage. This was dated the 20th of *January*, 1848, and thereby *John Attwood* demised the freehold part of the *Highlands* Estate to the two Misses *Attwood* for two hundred years, by way of mortgage, to secure the 30,000*l.* The deed after execution

July 15, 16.

A first mortgagee allowed the title deeds to remain in the possession of the mortgagor to enable him to give another limited security. The mortgagor then made several mortgages beyond the one contemplated, these mortgages having no notice of the first mortgage. Held, that the first mortgagee must be postponed to them, and that notice of the first charge ought to have been indorsed on the purchase deed. Mortgagees by demise postponed for allowing the mortgagor to retain the title deeds.

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tion was delivered to and was kept by *Miss Attwood*. The title deeds were however never delivered over to the *Misses Attwood*, but remained in the custody of *John Attwood*.

The two actions for the recovery of the first and second debts of 5,000*l.* and 10,600*l.* were vigorously prosecuted, but they were arranged upon *John Attwood* signing two agreements, dated the 24th of *April*, 1848, whereby he agreed to mortgage the *Highlands Estate* to secure the two debts, and forthwith to deposit the title deeds with Messrs. *Gem* and *Pooley*; but no formal mortgage was ever executed.

After this, *John Attwood* mortgaged the *Highlands Estate* in fee to persons who had no notice of the mortgage of the 20th of *January*, 1848, as follows:—

1. 7th of *September*, 1850, *Cardwells* . . £15,000
 2. 24th of *January*, 1851, further charge . . . 5,000
 3. 17th of *May*, 1851, *Whitaker* 3,000
 4. 27th of *August*, 1851, *Rea* 2,000
 5. 15th of *September*, 1851, *Currie* . . . 25,000
 6. 16th of *December*, 1851, *Barber* . . . 6,000
- and several others.

On the 22nd of *September*, 1853, the mortgages numbered 1, 2, 3 and 4 were transferred to *Perry Herrick*, who now claimed priority over the *Misses Attwood's* mortgage of the 20th of *January*, 1848.

As to the title deeds, it would appear, that on the execution of the mortgage to the *Misses Attwood*, they were left in the hands of *John Attwood*, and they were afterwards sent up to *Gem*, *Pooley* and *Beisly*, the *London* agents of *Roger Gem*, for the purposes of the security intended to be given to *Hawkin's* trustees and *James Alexander Attwood's* trustees. They were delivered

livered over to *Cardwells* on the completion of their mortgage, and were afterwards handed over by them to the Plaintiff, on the occasion of the transfer of the mortgages to the Plaintiff in 1853.

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Cardwells, on the occasion of the mortgage, took every possible pains and precaution to ascertain the title to the estate, and that there were no existing incumbrances on it, but they failed in discovering that of 1828 to the Misses *Attwood*.

Mr. *Barber* took similar steps as to the sixth mortgage and obtained statutory declarations from *John Attwood* and Mr. *Beisly* as to the existing incumbrances, which, however, did not state the mortgage of 1828.

In 1853, *John Attwood* fell into a state of pecuniary ! embarrassment, and his affairs were placed under inspectors, in whom his estate was vested, for the purpose of winding them up. It was not until afterwards, that the deed of the 20th of *January*, 1848, became publicly known or acted on.

The bill was filed in *June*, 1855, by *Perry Herrick* and *Barber*, alleging that when the mortgage of the 30th of *January*, 1848, was executed, the title deeds were in the possession and power of *John Attwood*, and so his sisters were well aware, and that no steps were taken to obtain possession of them, or to have any notice of the mortgage of the 30th of *January*, 1848, inscribed on any of them; that the mortgage of the 30th of *January*, 1848, was put away and kept secret, and this was purposely done, and there was the grossest possible neglect with regard to the title deeds, and that they were left in the possession and power of *John Attwood*, as though the mortgage of the 30th of *January*, 1848, had never been executed;
and

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and that the effect and object of this was, to enable *John Attwood* to deal with the estates as though he was absolute owner thereof; that *John Attwood* was thus enabled to deposit, and did in fact himself personally deposit, the title deeds with his solicitors, by whom the same were, by his direction, handed over to *Cardwells* on the occasion of their advance of 15,000*l.*, and *John Attwood* was enabled to obtain, and did obtain, the moneys advanced on the Plaintiff's securities, including the security of the 16th of *December*, 1851, and that this he would not and could not have done, had he not been enabled, by the Defendants, to hand over the title deeds and execute the securities, and deal with the estates as though they were totally free from any incumbrance.

The bill prayed a declaration that the Plaintiff's securities were the first charge on the estate and for a foreclosure.

Miss *Attwood* said, that the title deeds had not been placed in the possession of herself and sister, because, under the circumstances, they could not be properly handed over to them, and that the same were properly retained for the purpose of the security to be given to the trustees of *Hawkins* and *James A. Attwood*.

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Giffard* for the Plaintiffs, argued, that the Misses *Attwood's* security, though first in date, ought to be postponed; that the deed of the 20th of *January*, 1848, was voluntary and secret, and had been given for mere family purposes, and was intended to be enforced only when a necessity arose; that the Misses *Attwood* had been guilty of culpable negligence in allowing the mortgagor to retain  
the

the title deeds, and that they had thus enabled him to raise money as upon an unincumbered estate. That the Plaintiffs, and those under whom they claimed, had, on the contrary, when they advanced their money, taken every possible precaution to ascertain that there was no prior incumbrance; and that no mortgagee could be safe, if a prior incumbrancer allowed the mortgagor to retain the evidence of an unincumbered title. They cited *Evans v. Bicknell* (a); *Waldron v. Sloper* (b); *Worthington v. Morgan* (c); *Finch v. Shaw* (d); *Hiorns v. Holtom* (e); *Hewitt v. Loosemore* (f).

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Mr. Fookes and Mr. Druce for the Misses Attwood, and Mr. Bagshawe, and Mr. Elderton for parties claiming under them, and Mr. Bevir and Mr. Key for Mr. and Mrs. Troward, the third sister. First, the mortgage to the sisters was for a term, and the possession of the title deeds was not legally incident to their estate, nor were they required, upon the principle of reasonable diligence, to have stipulated for the possession of them; *Harper v. Faulder* (g); a termor is never entitled to the title deeds, for the freeholder ought properly to retain them; *Wiseman v. Westland* (h).

Secondly, Mr. Attwood had, by deeds of the 20th of May, 1839, and the 28th of January, 1841, covenanted to convey "a competent part of any messuages, lands," &c. of which he should become seised, for securing the sums of 5,000*l.* and 10,600*l.* due to Hawkins' trustees, and to those of James Alexander Attwood. This covenant formed a lien on the *Highlands Estate*.

*Wellesley*

(a) 6 Ves. 173, 183.

(b) 1 Drew. 193.

(c) 16 Sim. 547.

(d) 19 Beav. 590; 5 H. of Lds. Ca. 928.

(e) 16 Beav. 259.

(f) 9 Hare, 449.

(g) 4 Madd. 138.

(h) 1 Y. & Jervis, 122.

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*Wellesley v. Wellesley* (a); to which he and his sisters were bound to give effect, and it justified the non-delivery of the title deeds.

Thirdly, the Misses *Attwood* have the legal estate, and the mere non-possession of the title deeds is not sufficient to postpone them to subsequent incumbrancers, unless there be fraud or such gross negligence as to amount to fraud; *Evans v. Becknell* (b); *Barnett v. Weston* (c); *Colyer v. Finch* (d); *Hewitt v. Loosemore* (e); *Plumb v. Fluitt* (f); *Beckett v. Cordley* (g); *Martinez v. Cooper* (h); *Allen v. Knight* (i); *Farrow v. Rees* (h); *Stevens v. Stevens* (l); *Atterbury v. Wallis* (m); *Fontblaque's Equity* (n).

Fourthly, if the solicitors of *John Attwood*, having the deeds in their possession for a particular purpose, have improperly parted with them, the Misses *Attwood* are not responsible for their misconduct.

Lastly, *John Attwood*, who was the mortgagee of his brother's settlement, and interested in the mortgage agreed to be given for 10,600*l.*, was entitled to the custody of the deeds. He was also owner of part of the estate not mortgaged to his sisters (the copyhold), and, on that account, he had a right to the possession of the deeds.

Mr. *Follett* and Mr. *Morgan Lloyd*, Mr. *Amphlett*, Mr. *Selwyn*, Mr. *Osborne*, Mr. *Lloyd*, Mr. *Cadman* *Jones* and Mr. *Hallett* for other parties.


The

- (a) 4 *Myl. & Craig*, 501.
- (b) 6 *Ves.* 181.
- (c) 12 *Ves.* 133.
- (d) 19 *Beav.* 500.
- (e) 9 *Hare*, 449.
- (f) 2 *Anst.* 432.
- (g) 1 *Bro. C. C.* 353.

- (h) 2 *Russ.* 198.
- (i) 5 *Hare*, 272, and 11 *Jurist*, 527.
- (k) 4 *Beav.* 18.
- (l) 2 *Colly.* 20.
- (m) 2 *Jurist*, N. S., 117
- (n) *Page* 165, note.

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I shall do nothing more at present than express an opinion adverse to the claims of Misses *Attwood*. There is certainly nothing like fraud on the part of these ladies; and no expression could be more inappropriate as applied to them. But the state of the case is this:—They were creditors of their brother to the extent of 10,000*l.* each; they used no pressure upon him; they asked for no security, but he voluntarily gave them one, for the purpose of securing to them the money to which they were entitled. This case may be looked at in two points of view, first, supposing this was a mere voluntary charge in favour of his creditor by a man about to make a mortgage upon his property to a third person. The question is, whether that charge could be supported, it being created by him for the express purpose of affecting the value of the very mortgage which he was about to make to other persons, and being without notice to them. But I think it unnecessary to go into that, because I think, upon the evidence, I may treat this as an arrangement made between Mr. *Attwood* and his sisters, at the suggestion of the family solicitor, who acted both for Mr. *Attwood* and his sisters themselves, and not with the intention of prejudicing the future mortgagees. That reduces it to the second consideration, whether, in the circumstances of this case, these ladies ought to be postponed for having allowed Mr. *Attwood* to retain the title deeds of the property mortgaged to them?

I do not think it necessary to go through the class of cases which have been cited, with reference to what amounts to fraud or culpable negligence in permitting the mortgagor to retain the title deeds, because I find an express purpose in this particular case for which



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they were left under the control of the mortgagor. Before I go into that, I may state, that on the facts of this case, I dissent from the conclusion to which Mr. *Bugshawe* wishes me to come, though fully concurring with him in the principle, which is, that if a person entitled to priority as a mortgagee has got the deeds, he is not to be deprived of that priority by reason of the misconduct of a solicitor who might take away those deeds or give them to any other person, any more than he would be deprived of his priority if the deeds were stolen; he would be in the same situation. But, in my opinion, these deeds were never in the possession of Mr. *Roger Gem* in the character of solicitor of these ladies; and if they were ever in his possession in that character, it was only for a very short period, for the purpose of preparing the security to them.

Mr. *Roger Gem* was the solicitor of their brother Mr. *John Attwood*, who makes this charge in *January*, 1848, in order to secure the claims of his three sisters: they are informed of this, and at the same time, they are informed, that Mr. *Attwood* is making an arrangement of his affairs, and that he proposes to make a mortgage for the purpose of securing the moneys due from him to the trustees of Mr. *Hawkin's* will, and of his brother *James'* settlement; and that the title deeds are to be in Mr. *Roger Gem's* possession, as the solicitor of Mr. *John Attwood*, for the purpose of enabling him to make that charge.

Then the case amounts to this:—Certain creditors of the owner of an estate, in taking a mortgage, allow him to retain the title deeds, for the express and admitted purpose, of raising money on the same property, and for making other charges on it. I think it is impossible  
 for

for them to say, after this, that the owner, having received money and created charges on the property, those charges are not to have priority over their mortgage; for they have allowed him (I do not say fraudulently or improperly) and it was their intention to allow him to raise money on this property without any reference to their security. It is true they say, that he was to be allowed to raise money on this property for a specific and particular purpose only, and that he has exceeded this permission and raised money on it for other and distinct purposes: but when he was allowed to retain the deeds, it was clearly a matter resting entirely on his honor whether he did or not so limit the charges to be created. Having allowed all the title deeds to remain in the possession of their brother, for the purpose of raising money of a specified amount on the property, in priority to their charge, to meet a particular claim, he does raise money in priority to their charge, but not the particular sum in question; that is to say, he does not give a mortgage to Mr. *Hawkin's* and his brother's trustees. But supposing this money had been applied in payment of these two debts, would not the question have been exactly the same? I, however, put the case on still broader and more extensive grounds; for I think that the deeds being allowed by his sisters to remain in his hands for the purpose of raising money in priority to their charge, they cannot afterwards complain of the extent to which that money has been raised, but that whatever he so raised, from persons having no notice of their charge, must have priority over them.

They had abundant means of preventing it. Besides that of retaining the title deeds, they might have caused an endorsement to be made upon the purchase-deed by their solicitors. It is true that these ladies knew nothing  
whatever

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whatever about the matter; but by the rules of law, I am bound to treat them exactly in the same way as if they did, because all the acts which their solicitor did, or ought to have done, are considered acts which they did or ought to have done themselves. Their solicitor might have made an endorsement on the deed, that there was a charge of 30,000*l.* in favour of these three ladies, which was only to be subject to a specific sum of money to be afterwards raised for payment of the trustees of *Hawkins'* and of his brother; in which case, nobody could have advanced money on this estate without having had notice of this charge; I am of opinion that it was their duty, if they intended to confine the particular charge, which they permitted their brother to raise on this property, to the extent of the debts due to these two trusts, to have caused some such endorsement to be made, so as to prevent more money being raised than they intended. They allowed their brother to raise money, and merely took his word that he would not raise any sum beyond the 15,600*l.* When I say "they took his word," I do not mean that there was an express promise made to them, but the deeds were retained by him for the admitted purpose of raising the 15,600*l.*, and therefore they expected and assumed that he did not intend to raise any more. In other words, they trusted to his honor not to raise a greater amount, but as he has thought proper to raise a larger amount, to that larger amount I am of opinion they must be postponed. That is my view of the rights of the Plaintiffs.

I will make a declaration, that the Misses *Attwood* must be postponed to the claim of the Plaintiffs. I shall then make a decree for sale, giving a direction to ascertain the priorities, and without prejudice to any question which may exist between co-Defendants, or  
 which

which may exist between any other Defendants and the Plaintiffs.

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With respect to an argument put forward, that Mr. *John Attwood* was the sole surviving trustee of his brother's settlement, and therefore the proper person to have the custody of these deeds, it cannot, in my opinion apply. He had not the legal estate under the deeds of *April*, 1848, for that had already been conveyed to the two Misses *Attwood*, and if the legal estate had been conveyed to Mr. *John Attwood*, and he had been made the trustee for the purpose of raising this money, the same question might have arisen : in fact Mr. *Attwood* was only a *cestui que trust* under that deed ; and, as a trustee of the marriage settlement, he was bound, when he received that money, to hold it in trust for the persons entitled under the marriage settlement.

In any view of the case, I am of opinion that Mr. and Mrs. *Troward* cannot stand in a better situation than the two Misses *Attwood*, in whom the term was vested for the purpose of raising this money, and that they also must be postponed to the Plaintiffs.

With respect to the statutory declaration which was made, I think it proper to observe, that the solicitors for the Plaintiff appear to have taken every reasonable precaution which they could take. They had all the title deeds, they had a clear deduction of title, and there was nothing to shew that there was any mortgage on the property: they obtained the solemn assurance of the mortgagor that he had made no other incumbrances than those stated in the schedule to his deed, except certain equitable deposits created by the mortgage deeds which are all answered, not merely by his statement, but by the production of the deeds themselves.

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It is therefore obvious that if Messrs. *Cardwell* have not a good title to their mortgage, it is impossible that anybody can be sure he has got one, even when dealing with the most respectable persons, and the most respectable solicitors. It would necessarily follow, that, except by a registration of deeds, you could not be certain, even with possession of the title deeds, that you had a good title to the property. The difficulties in these cases make it a matter of great importance, and a point of honor with solicitors, which, according to my experience, they invariably act on, to mention to the other party with whom they are dealing the slightest suspicion of a charge upon property which another firm are advising their clients either to purchase or to advance money upon.

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NOTE.—Affirmed by Lord Cranworth, 2 De G. & Jones, 21.

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July 18.

SMITH v. COLMAN.

A testator bequeathed his residue to his wife for life, and at her decease "to be equally divided between his two daughters, B. and C.," and in case of marriage to be settled on themselves. The tenant for life was still living, and B. had never been married. Held, that B. took an absolute vested interest on the death of the testator.

THE testator, *John Colman*, made his will dated the 2nd day of *February*, 1854, which was as follows:—"I give to my wife, *Margaret Colman*, the interest of everything and all I die possessed of for her life (except what is conveyed previous to my decease), and at her decease the principal to be equally *divided* between my two daughters, *Jane Colman* and *Mary Colman*; and in case of marriage, to be settled upon themselves, together with all sums conveyed to them prior to my decease."

The testator died in *August*, 1854; his daughter *Mary* was married at the date of his will, but *Jane* had never been married. *Margaret*, the widow, was still living.

A question

A question arose as to whether *Jane Colman* had an absolute vested interest.

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Mr. *R. Palmer* and Mr. *Toller* referred to *Edwards v. Edwards (a)*.

Mr. *Shebbeare*, *contra*. The case is not like one depending on death, which is most certain, but on marriage, which is perfectly uncertain and contingent: it is like a gift on death without issue living at the death of a tenant for life. If therefore the daughter should marry in the lifetime of the widow, her interest must be settled.

Mr. *Dickinson* for another party.

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There is no gift over, and I think, on the face of the will, the testator meant marriage before the interest became vested. My opinion is, that *Jane* took an absolute interest, she not being married at the death of the testator, and I will therefore declare, that *Jane*, being unmarried at the death of the testator, took an absolute interest.

(a) 15 *Beav.* 357.

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Feb. 8.

## PEILLON v. BROOKING.

A testator bequeathed personal estate in trust for the separate use of a *feme covert*, and without power of anticipation. The legatee was, at the date of the will, domiciled abroad, and had continued so ever since. By the law of her domicile, the restraint against anticipation was disregarded, but this Court, nevertheless, refused to give effect to a beneficial arrangement made by her anticipating her income.

THE testator, *George Richard Robinson*, by his will made in 1850, devised and bequeathed his real and personal estate to trustees, in trust to sell and convert; and he declared, that for the purposes of enjoyment and transmission, the trust estate should be considered as money from his decease. And he directed the trustees to invest the trust moneys in the public stocks, funds or securities, or on mortgage, and to stand possessed of the trust funds and premises, "upon trust to pay the annual income thereof, as and when the same should from time to time become actually receivable, and *not by way of anticipation*, into the proper hands of his daughter *Louisa Matilda*, the wife of *Joseph Lazard Peillon*, then or late residing in or near *Paris*, during her life, or into any such banking house, or to such bankers or agent as *Louisa Matilda Peillon* by any letter or other writing under her hand should, from time to time, notwithstanding any coverture, nominate, to be placed at her account at such banking house, or with such banker or agent, for the separate use of the said *Louisa Matilda Peillon*, free from the control of her then present or any after taken husband, *without power of alienation or anticipation*, as a strictly personal provision, and for which annual income her receipts alone should be sufficient discharges. And immediately after the decease of *Louisa Matilda Peillon*" upon certain trusts for her children.

The testator died in 1850. In 1833, *Louisa Matilda Peillon* had married in *London* *P. Joseph L. Peillon*, a Frenchman. At the date of his marriage, *Mr. Peillon*

was

was a domiciled Frenchman, and his wife was a domiciled English subject. For some time previous to and at the date of the testator's death, Mr. and Mrs. *Peillon* were domiciled in *France*, but they had since taken up their residence at *Nice* in the Sardinian dominions, and were now domiciled there. Mr. and Mrs. *Piellon* had separated, in consequence of the misconduct of the latter, who, by the laws of *Sardinia*, was liable to criminal prosecution. Proceedings had been taken by the husband, but which had been suspended with a view to a compromise.

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Under these circumstances, a deed of separation and arrangement, in the English form, was executed by them and trustees on the 1st of *November*, 1856, by which Mrs. *Peillon* purported to settle an income of 1,000*l.* a year on her husband, and 200*l.* on each of her children, out of the property held under the testator's will, and Mr. *Peillon* on his part entered into onerous engagements.

This deed was confirmed by a legal act, executed in *Turin* according to the law of *Sardinia* by Mr. and Mrs. *Peillon*. A petition to give effect to the arrangement, by ordering, for the future, the payments agreed to be made to the husband out of the income of the trust fund, which amounted to 3,530*l.* a year, now came on for hearing. In order to ascertain the law of *Sardinia* on these matters, a case was laid before a Sardinian Advocate for his opinion. The case and opinion were in substance as follows:—

The case, after stating the direction in the will, to pay the income to the daughter free from the control of her husband, and without power of anticipation, asked first, whether the deed of separation made at *Nice* was  
 valid,



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valid, and whether, according to the law of *Sardinia*, it engaged the personal interest of the wife, notwithstanding the special clauses of the will forbidding and preventing all alienation and anticipation of her said income.

The answer was:—The prohibition to alienate and claim, in anticipation, the revenues of the succession and all the other clauses inserted by the testator in his will for the purpose of better securing to his daughter, exclusively and personally, the enjoyment of his fortune, would be considered by the Sardinian tribunals only as counsel or rules for prudent and good management, given by the testator to the legatee, the neglect and infraction of which could not, in any case, give occasion for the nullity of assignments or alienations made and accepted in good faith, and still less for the forfeiture by the legatee. In this respect, the jurisprudence has been settled long since, or to speak more correctly, it has never fluctuated; it is based upon the principle, that one can always reassume a right introduced for one's self. Moreover, as wife and as mother of seven children, she has duties and obligations emanating from nature itself, sanctioned by dispositions of the civil laws, and regarded as measures of public order, from the accomplishment of which no human will could exempt her. As wife, she must contribute one-third of her entire income to the family charges; as mother, she must contribute to the expenses of maintenance and education of her children, and also contribute a marriage portion for her daughters.

The second question was:—Can a testator, according to the laws of *Sardinia*, leave the revenue of his property to a married woman, for her separate use and benefit independent of all debts and control of her husband,

husband, and forbid her to alienate it, in the same manner as this testator has done by his will?

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The answer was:—Without doubt, according to the Sardinian laws the usufruct of a succession can be left to a married woman with the condition, that she alone can receive the income thereof; but it would not be equally possible to free her entirely from the control of her husband; she would always require his authorization to institute legal proceedings. In addition, she could not perform any act, beyond the simple administration of her goods, without the personal or written consent of the husband; and even for the usufruct in question, the wife would be subjected to the duties and obligations which are imposed on her by the law, either towards her husband or to her children.

In answer to another question, the advocate was of opinion, that an adulterous wife, although belonging to another nation, could be accused and prosecuted in the Sardinian tribunals, provided the offence had been committed in *Sardinia*. And further, that the wife could be deprived of the administration of her property, and that it could be confided to the husband, as a measure of coercion, in order to bring her back to the feelings and duties of her position. He was also of opinion that by means of some judicial inquiries the competent tribunals would assuredly sanction and confirm the deed in all its parts.

An additional statement was afterwards laid before him, that, according to the law of *England*, the clause which restrained any anticipation of the income before it became actually due was good and valid, and not to be considered merely as a rule of conduct or counsel, but as an obligation: and that no alienation or disposition,

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sition, by way of anticipation, had any force or validity whatever. Further, that the wife, in respect of income not actually accrued and due, was under an absolute personal incapacity to contract or make any alienation or disposition whatever. He was asked whether this additional statement induced any, and what, qualification or variation of the answers heretofore given.

He answered :—I see no reason to induce me to alter my answers in consequence of the above statement. •

Mr. *Lloyd* and Mr. *Giffard* in support of the petition.

The question is, whether the Court must not, in favor of a *feme covert* domiciled in *Sardinia*, adopt the principles of the Sardinian law, to the extent of relaxing the restriction against anticipation contained in the will of an English testator.

By the law of *England*, if property be given, the donee takes it subject to all its incidents, and amongst them the right of disposition, if, by the law governing his *status*, the donee is competent to act for himself. The ordinary clause against anticipation depends for its efficacy on the legal incompetency to act of the person sought to be affected by it, and it is operative only so long as that incompetency exists. According to the settled law of this country, if a testator make a provision for the separate use of a married woman, free from the control, not only of her present, but of any future husband, and without power of anticipation at any time during her life, this is perfectly settled, that notwithstanding the direct and clear restraint against alienation in the will, as well during coverture as during  
discovery,

discoverture, the law will not regard the restraint while the *feme* is *sui juris*; the moment her coverture ceases, and she becomes legally competent to act for herself, she may dispose of the property.

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In *England*, during coverture, there is a personal incompetency in a married woman to act, and this gives validity to the restraint; but in *Sardinia* there is none; she may dispose of any property, subject to certain formalities, and the restraint is therefore inoperative. It is important to consider the manner in which, and the principles upon which, the clause against anticipation has been allowed to have any operation here. When a provision has been made for the separate use of a married woman, Courts of Equity have considered, that as an incident to that separate provision, there was attached to the separate estate the right to dispose of and alienate the property; and this Court has given effect, not merely to the separate enjoyment by the married woman, as against the legal rights of her husband, but also, as one of its incidents, to the right to dispose of the property. The clause against anticipation was subsequently introduced, by restricting the equitable right of disposition, when it appeared that the donor, in making the provision for the separate use of the married woman, did not intend to give to her a competency to alienate, which the law itself did not give; the Court, then, in giving effect to a separate equitable provision for a married woman, adopted, at the same time, the legal principle, that a married woman is incapable of disposing of her property; and it thus gave effect to the clause restricting alienation. The rule of law, which pronounces her incapacity to alienate, was adopted; but when her personal incompetency is got rid of, as by the cesser of the coverture, the married woman becomes restored to her natural rights

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rights of alienation, of contracting, and of acting, and she can no longer be restrained from anticipation, notwithstanding the most strict terms in the will on the subject.

The same result must follow when the legal capacity of a married woman is restored by other means, or when the incapacity by law never exists.

If the clause against anticipation is founded upon the English law, which determines the personal incompetency of a married woman to contract or to act, then when the legatee or donee is not under the dominion of the English law, in consequence of her domicile being in another country, the law of which recognises her personal competency to act and to alienate, it seems, by strict analogy to the other cases, to follow, that the restraint against anticipation is inoperative. The effect of the Sardinian law is shewn to be, that notwithstanding a clause against anticipation, introduced into a provision for the separate use of a married woman, she would be entitled to alienate and to anticipate the income, and that a clause of that description would be considered, not as mandatory, or as creating any obligation or disability in the wife, but merely as directory, and suggesting, as a matter of prudence, that she ought not to anticipate.

The proposed arrangement is so clearly for the benefit of the Petitioner and her family, that if the Court has any discretion it will sanction it.

Mr. *R. Palmer* and Mr. *Lewin* for the husband.

This Court ought to give effect to this arrangement, if it be satisfied of its propriety.

Several

Several cases have determined, that it is impossible for a testator, by any indication of intention, to fix upon property a condition preventing its alienation, in the case of a person having, by law, a full competency to alienate; *Brandon v. Robinson* (a). In *Jones v. Salter* (b), and *Barton v. Briscoe* (c), Sir William Grant and Sir Thomas Plumer followed the principle laid down in *Brandon v. Robinson*, and applying it to a married woman, they held, that where property was given to the separate use of a married woman without power of anticipation, the restraint against alienation was as completely a nullity, as regarded her, when she became discovert and competent to alienate, as it would be if applied to a man; and consequently, that the restraint was absolutely void as against her power of alienation while a widow, because she had that power by law, of which the testator could not deprive her; such a restraint being repugnant to the nature of property. The same consequences would follow, whether she were or were not married at the time of the gift.

In the case of *Woodmeston v. Walker* (d), Sir John Leach refused to transfer property given to an unmarried woman without power of anticipation, holding that it was a trust which would operate in case of a future coverture, and that she could not destroy the restraint so long as her marriage was possible; but Lord Brougham, upon appeal, thought it a necessary consequence of the principle of the other cases, that she should have, while discovert, the power of disposition, notwithstanding the restraint against anticipation. The principles laid down in *Woodmeston* and *Walker* (d) apply nearly to every case, and shew that

where

(a) 18 Ves. 429.

(b) 2 Russ. & Myl. 208.

(c) Jacob, 603.

(d) 2 Russ. & Myl. 197.

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where there is a personal capacity the restraint against anticipation is ineffectual.


The fact of the testator having expressed, in his will, there should be no power of alienation is wholly unimportant and ineffectual; it cannot take away a power of alienation which, notwithstanding the prohibition of such will, belonged to the person by the law to which that person is properly subject.

The case of *Tullett v. Armstrong* (a) recognized and followed the same principles, and engrafted on them this doctrine:—That although where a woman has a capacity of disposing of her property, no prohibition in a will can take it away, unless there is a gift over by way of defeasance; yet, that if the property remain unaltered, by any act of alienation during the period of discoverture, and a legal incapacity afterwards supervene by marriage, then the restriction against anticipation and the trust for her separate use take effect.

In *Tullett v. Armstrong* Lord *Cottenham* eventually arrived at the conclusion, to which he came in rather a remarkable way. Feeling the great difficulties, he proceeded upon what may be called a principle of development, founded on the power of this Court to enlarge and develop a doctrine of its own creation for the purpose of giving effect to that doctrine. Upon this subject the language of Lord *Cottenham* is very important (b). His Lordship says,—“After the most anxious consideration, I have come to the conclusion that the jurisdiction which this Court has assumed in similar cases justifies it in extending the protection of it  
to

(a) 1 *Beav.* 1, and 4 *Myl. &* (b) 4 *Myl. & Cr.* 405.  
*Cr.* 377.

to the separate estate, with its qualification and restriction attached to it throughout a subsequent coverture; and resting such jurisdiction upon the broadest foundation, and that the interests of society require that this should be done. When this Court first established the separate estate, it violated the laws of property as between husband and wife, but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate, and it was found as part of such law that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation." "In the case now under consideration, if the after husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been established will be lost. Why then should not equity, in this case also, interfere, and if it cannot protect the wife consistently with the ordinary rules of property, extend its own rules with respect to the separate estate, so as to secure to her the enjoyment of the estate which has been so invented for her benefit."

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These observations appear very forcibly to shew, that incapacity is entirely founded on rules and principles essentially inapplicable to any case except that of a married woman, whose capacity as to property is governed by the laws of this country, and whose rights, as between herself and her husband, are governed by the same laws.

The will of this testator prohibiting anticipation is a mere nullity, unless you find a state of incapacity upon



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which the intention of the will can operate. If, by the law of the country, that state of incapacity does not exist, it seems extremely difficult to suggest a principle on which it can be held to operate, when, under similar circumstances, it has been held inoperative in this country.

The Court must regard the question of the capacity and legal rights of a married woman with respect to her property, by reference to the law of her domicile. Thus Justice *Story* states, that "Where there is no express contract, the law of the matrimonial domicile will govern, as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle, that movables have no *situs*, or rather, that they accompany the person everywhere. As to immovable property, the law *rei sitæ* will prevail." (a)

Assuming it to be the settled law of *Sardinia* or of *France*, where the parties were domiciled at the time of the will, that every married woman has the same power of disposing of her property as if she were unmarried, how is it possible, consistently with the principle on which this law has been developed, more especially consistently with the principle on which Lord *Brougham* overruled the decision of Sir *John Leech*, in *Woodmeston v. Walker*, to hold, that this Court will enable a testator to create an incompetency which the law does not originally create, and which is a distinct thing from taking advantage of an incompetency which the law itself imposes.

The Court has acted upon the principle laid down by *Story*, in several cases with reference to the equitable right

(a) *Conflict of Laws*, p. 253 (2nd ed.)

right of the wife to a settlement. It might be said, that if a legacy be given by an English will, all the usual English equities must attach to it, and amongst them the wife's right to a settlement; but the contrary has been determined. In *Campbell v. French* (a), Lord *Loughborough* said, speaking of a commission to take the consent of a married woman in *America*, "No doubt I could send a commission abroad; but it depends a little upon the law of the country where the party resides, whether it might not be paid to the husband. I think there was before Lord *Thurlow* a case of a legacy to a married woman in the Prussian dominions and being a Prussian subject, and it being stated that by the law of *Prussia*, when the money got there it would belong to the husband, the money was paid to him." The same thing was done in the case of *Sawer v. Shute* (b); and in *Dues v. Smith* (c); and of *M'Cor-mick v. Garnett* (d).

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*PEILLON*  
*v.*  
*BROOKING.*

All these cases appear to shew, that for every purpose connected with personal capacity and the general rights of a married woman or her husband as to personal property, you refer to the law of their domicile, and if by the law of domicile you ascertain that the married woman has a capacity of alienation, like that which a *feme sole* would have in this country, then the law of separate use has no application, and the restraint upon anticipation is inoperative.

These considerations acquire additional force from the circumstance that it is shewn that there are duties cast upon the Petitioner by the law of her domicile, which, giving these particular rights to the wife, also prescribes

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(a) 3 *Ves.* 321.  
 (b) 1 *Anst.* 63.

(c) *Jacob*, 544.  
 (d) 5 *De G., M. & G.* 278.

1857.  
  
 PEILLON  
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to her a mode of exercising them, and impose on her obligations which it will enforce, if it be necessary, by penal proceedings or otherwise. Thus she might be called on to contribute towards the maintenance of the family, which the husband might enforce; and the application of the laws of this country may disable her from performing her obligations founded on the special rules of the law of her domicile. They also cited *Wilton v. Hill* before Vice-Chancellor *Kindersly* (a) to shew that a limitation for the separate use without power of anticipation does not produce an absolute incapacity in the wife.

Mr. *Selwyn*, Mr. *G. Russell*, and Mr. *C. Russell*, for other parties, took no part in the discussion of this question.

*The MASTER of the ROLLS.*

1858.  
 Jan. 29.

I am so convinced of the propriety of the compromise, if it can be carried into effect, that I will not pronounce my final judgment on the present occasion, in order that I may see what can be done on the subject beneficial to the parties.

I think I do not under-rate the importance of the question now raised, and which has arisen of late in one or two instances of very considerable moment. Unfortunately, on the present occasion, it has only been argued on one side, everyone being desirous of inducing the Court to carry the arrangement into effect. This makes it the more necessary for the Court to consider it, because the decision in this case will doubtless be  
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(a) 25 *L. J. Ch. Rep.* 156.

cited upon subsequent occasions in similar cases with a view to shew the opinion which the Court formed on the question.

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PEILLON  
v.  
BROOKING.

Practically, the only question is this: whether, by reason of the domicile of the wife, the law of *Sardinia*, and not the law of this country, is to govern the construction of the testator's will. Several cases have been cited to shew that when a legacy is given to a lady whose husband is domiciled abroad, it has followed the law of that country; but no case has been cited to me to shew that this law will not permit a testator here to create trusts in favour of such a lady, provided they are consistent with the laws of this country, or that that foreign country would not carry them into effect, under that principle of comity of nations, by which one country carries into effect the laws and dispositions of another. What I have to consider is, not merely whether the law of *Sardinia* is to govern this particular legacy, but whether, if a *French* gentleman were to leave a legacy to a lady domiciled here, we should say, that the dispositions and provisions of this will are not to be carried into effect, but are to be governed by the law of this country, abandoning, as we should, that principle of the comity of nations, by which one country has carried into effect the laws and dispositions of another.

Now, undoubtedly, the question of the extent of the capacity and incapacity of persons, which is produced by a change of domicile, has of late been very much considered, though I do not think it has met with any complete judicial exposition. A case occurred the other day, which (fortunately for the parties themselves, but unfortunately as regards the decision of the law) was compromised, which involved in principle

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ciple something of the same question which is involved here, and which, if I have not been misinformed, was of this nature :—A domiciled Englishman made a valid will in this country, and then went abroad and became domiciled and died in *France*. By the law of *France*, his previous will was invalid, he having excluded certain members of his family, which was contrary to the law of *France*. It was urged that the law of *France*, and not the law of this country, must govern the construction of that will, and that question has not, I believe, received judicial decision. The case was compromised, but it obviously raised a question of very great importance as to the amount of capacity and incapacity imposed upon a man by reason of a change of his domicile. Now undoubtedly, though the extent to which it goes is considerable, it does not deprive him of his civil rights in this country: he still remains an English citizen, and is entitled to the protection of the English government, and his children would still be natural born English subjects. But whether the effect of a change of domicile is to deprive them of the rights and powers of English citizens in other respects, is a point which, I think, has not, at present, been determined by any Court in this country, and is one of very great importance.

That question appears to me to govern this case; the question being whether this lady, by being married to a domiciled Sardinian subject, has lost the capacity of taking this property according to the English law, as directed by the will of the testator: because if she has not, then I apprehend the law of this country must give it to her in that form as far as it can do so.

The opinion of the Sardinian advocate, though very clear and distinct, does not meet the exact point to which

which I wish to have my attention called, which is, whether the Sardinian Courts would, by the comity of nations, have carried the law of this country into effect there: but even that question alone, if answered in the negative, would not dispose of the whole case. My present impression, I regret to say, in this particular case is, that this agreement cannot legally be made prospectively binding on the married woman, although I have no doubt of its being for her interest to carry it into effect. Her ratification from time to time, every year, after the dividends are received, would be perfectly binding on everybody, and it is worth considering whether some arrangement might not be made with the Courts in *Sardinia*, by which the criminal proceedings there should be suspended as long as this arrangement was carried into effect or subsisted between the parties, and also whether, by the arrangement, the money could not be paid to a banker in that country, where it would be subject to the laws of *Sardinia*.

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 PEILLON  
 v.  
 BROOKING.

This is the general view I take of this case, but I will look into it more fully before I finally express my opinion, though I doubt very much whether I shall be able to arrive at any conclusion which will enable me to say that this deed can be here considered to be binding upon this lady, and which, under no circumstances, she can afterwards set aside, having regard to the terms of the will of the testator.

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*The MASTER of the ROLLS.*

I have considered this case still more fully, but I see no reason to add anything to what I said on the former occasion.

Feb. 8.

1858.

PEILLOW  
v.  
BROOKING.

occasion. I should have been very glad if I could have made a direction to carry into effect, compulsorily, the arrangement which has been entered into between the husband and wife. That it may be carried into effect practically I have no doubt. I am clear, however, that I cannot direct it or make it compulsory on the lady.

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GORELY v. GORELY.

Jan. 11.

Where the Plaintiff, after answer, gave notice of motion for a Receiver, but filed no affidavits, and he ultimately abandoned it, the question of whether the Defendant is entitled to more than 40s. costs depends on whether the Plaintiff has given notice to use the answer.  
*Semle.*

Where on a notice of motion, no affidavit has been filed, it may be abandoned on payment of 40s. costs, although the motion has, on a former occasion, been reserved.

THE Plaintiff, after answer, gave notice of motion for a Receiver; but no affidavits were filed.

Mr. *Follett*, for the Plaintiff, had, on a former day, reserved his notice of motion, but he ultimately abandoned it.

Mr. *R. Palmer* and Mr. *Selwyn* now asked for the full costs of the motion. They argued, first, that although no affidavit had been filed, the answer might have been read on the motion, and that the Defendants had necessarily furnished their counsel with a copy. Secondly, they insisted, that the motion, having once been reserved (a), could not afterwards be abandoned without payment of the full costs.

The MASTER of the ROLLS thought that the first question depended on whether, in the notice of motion, it was stated that the answer would be used on the motion;

(a) *Dugdale v. Johnson*, 5 *Hare*, 92.

motion (a); but he said the Registrar would draw up the proper order.

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GORELY  
v.  
GORELY.

He held that a party was not prevented abandoning a motion, by the fact of having previously reserved it.

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(a) See *Davis v. The South Eastern Rail. Co.*, 23 *Beav.* 549, and the note, p. 550.

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STOCK v. VINING.

Jan. 13.

**T**HIS was a suit to rectify a marriage-settlement, and a decree was accordingly made.

In a suit to rectify a settlement, there being no blame imputable to any of the parties, the costs are payable out of the fund.

Two questions arose, first, as to the mode in which the settlement was to be reformed, and, secondly, as to the costs of the suit.

Mode of rectifying a settlement by striking out the erroneous words and indorsing the decree.

Mr. *Follett* and Mr. *Fry*, for the Plaintiff, said that there had been an accidental mistake, for which the Plaintiffs were no more responsible than the Defendant.

Mr. *Amphlett* for the trustee and infant.

The MASTER of the ROLLS ordered that the settlement should be reformed by striking out the words erroneously introduced, and intimated that he would add his initials. He said that the decree ought to be indorsed on the settlement.

As to the costs, he hesitated, at first, as to ordering them to be paid out of the *corpus*, but ultimately he decided, that as no blame was to be imputed to any of the parties, the costs of all parties must be paid out of the *corpus* of the property,



1858.

## GRIFFITHS v. PORTER.

Jan. 28.

The Court will not visit a trustee with the consequences of a breach of trust committed with the sanction or by the desire of the *cestui que trust* or of one committed without such sanction or desire, if, when it comes to the knowledge of the *cestui que trust*, he has acquiesced in and obtained the benefit of it for a long period.

Two trustees, *A.* and *B.*, joined in the receipt of trust money. *A.* allowed *B.* to retain the cheque for the money, which, against the remonstrances of *A.*, he placed in the hands

of a solicitor to invest on mortgage, and it was lost. Held, that both were liable.

Two trustees, *A.* and *B.*, had allowed trust money to be received by their solicitors. The *cestui que trust* authorized its investment on a mortgage by *B.* alone. The money being in danger and the solicitors pressed, a mortgage was given, but as to which *B.* exercised no judgment, and it turned out insufficient. Held, that both trustees were liable for the loss.

Tenant for life received 5*l.* per cent. on a mortgage improperly taken by trustees, and for which, on a loss, they were made responsible. Held, that he was only entitled to four per cent. in taking the account of income, and that the remaining one per cent. must be taken as part of the subsequent income.

THE testator devised a real estate to his sons, *Thomas Porter* and *Richard Porter*, upon trust to sell and to invest the produce in "Government Stock, or at interest upon real security," to be held upon trust for his son *Henry Porter* for life, with remainder equally amongst his children. The trustees were to be chargeable only for such moneys as they should respectively receive, notwithstanding their joining in any receipt for the sake of conformity, and were not to be answerable for any person "with whom or in whose hands any part of the said trust moneys should or might be deposited or lodged for safe custody or otherwise," "except the same should happen by or through his or their own wilful default."

The testator died in 1835, and in 1853, the trustees sold and conveyed the estate, and they both signed a receipt for the purchase-money, the ultimate available surplus of which amounted to 1,500*l.*

The purchase-money thus received in *April*, 1853, was paid into a bankers, to the account of Messrs. *Selby* and *Norton*, the solicitors employed by the trustees

tees in the sale, for the purpose of being invested on mortgage. Messrs. *Selby* and *Norton*, being pressed, ultimately obtained a mortgage for the amount from Mr. *William Coleman Selby* (the brother of Mr. *Selby* the solicitor). Messrs. *Selby* and *Norton* became bankrupts in *November*, 1854, and the mortgage turned out to be a bad security.

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 GRIFFITH  
 v.  
 PORTER.

*Henry Porter*, the tenant for life, died in *March*, 1856. He had three children who survived him, and this suit was instituted by two of them against their uncle, *Richard Porter*, and against the representatives of their uncle *Thomas Porter* (who was dead) to make them responsible for the 1,500*l*.

This was resisted by the Defendant *Richard Porter*. The judgment of the Court proceeded on his own statement, and it is therefore necessary to detail the substance of his version of the matter, as stated in his answer and affidavit.

He said, that he joined in signing the receipt for the purchase-money for the sake of conformity; that at the execution of the conveyance a cheque for the purchase-money was delivered to his co-trustee, *Thomas Porter*, in whose hands it remained. That at the conclusion of the business, *Selby* and *Norton*, their solicitors, offered to invest the money on mortgage, which he declined, but they said they would mention the matter to *Henry Porter*. The two trustees then proceeded to the house of *Henry Porter*; and *Henry Porter* and his three children, who were all of age, being present, a conversation took place as to investing the money on mortgage, when *Richard Porter* repeated his determination not to mix himself up with investing the money on mortgage. *Richard Porter's* answer then proceeded as follows:—"After this, a general conversation

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 v.  
 PORTER.

conversation ensued between *Henry Porter* and his family, at the conclusion of which, they expressed their determination that the money *should be invested on mortgage by Thomas Porter*, who then gave them his verbal undertaking to see the money placed out on mortgage, without my acting therein, and they accepted such undertaking, and authorized him so to proceed. That on the same day, after the said meeting had terminated, *Thomas Porter* said to me, "that it was his intention to pay the 1,500*l.* to the account of Messrs. *Selby* and *Norton*, at the *Maidstone* Bank, for the purpose of investment on a mortgage, whereupon I reasoned with him as to the impropriety of doing so without first investigating the mortgage security, when he replied, that he was quite satisfied that Messrs. *Selby* and *Norton* would get the mortgage properly completed in a very short time," &c. &c. "I again strenuously objected, and said I would have nothing whatever to do with it, as I thought it would be quite soon enough to let Messrs. *Selby* and *Norton* have the money when the mortgage deeds were completed. But *Thomas Porter* insisted on paying the money into the *Maidstone* Bank, and I then left him and went in a contrary direction. And I have since been informed, that on the same day *Thomas Porter* paid the money into the *Maidstone* Bank to the account of Messrs. *Selby* and *Norton*."

*Richard Porter*, in his affidavit, further stated, that after he and his brother *Thomas* parted company, "they both met, in the evening of the same day, at *Henry Porter's* house, and while at tea with *Henry Porter* and all his children, they were told distinctly by him, that his brother *Thomas* had placed the money to *Selby* and *Norton's* account with the *Maidstone* Bank, for the purpose of investing the same on mortgage,  
 with

with which he was not satisfied, upon which a conversation arose upon the subject, the general effect of which was *a determination on the part of the said Henry Porter and his family to invest the money upon mortgage under the direction of Messrs. Selby and Norton.*"

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GRIFFITH  
v.  
PORTER.

The money having thus been placed under the control of Messrs. *Selby and Norton* in *April*, 1853, and no mortgage having been procured, it appeared that *Richard and Thomas Porter*, in their correspondence in *February*, 1854 and subsequently, expressed great anxiety as to its safety; and *Thomas* said, that if the mortgage should not be completed, he should "insist on the 1,500*l.* being immediately invested in 3 per Cents." Applications were repeatedly made to the solicitors, but which produced no result down to *June*, 1854, when their credit became shaken, and the difficulty of getting back the money was too apparent; and *Thomas* himself expressed his opinion that they had used the money, and that it could not be got back without suing them: they continued to press them, and on the 7th of *August*, 1854, without any negotiation as to any particular mortgage, Messrs. *Selby and Norton* wrote to *Thomas Porter* as follows:—"The security was executed to day for the 1,500*l.*, and is sent to *London* to have an additional stamp put on, which we could not obtain in the country. If you will be good enough to call when you are this way, some day after *Friday*, we will deliver the security to you."

The deed referred to was a second mortgage of *William Coleman Selby* for the 1,500*l.*; it continued in the hands of Messrs. *Selby and Norton* until their bankruptcy in *November*, 1854, and was afterwards delivered over by the assignees to the trustees.

Messrs.

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 PORTER.

Messrs. *Selby* and *Norton*, as may be supposed, had drawn the 1,500*l.* out of the bank, and the mortgage security was insufficient.

The cause now come on for hearing, the contest was as to the liability of *Richard Porter* alone, the representative of *Thomas* being willing to pay half of the loss.

Mr. *R. Palmer* and Mr. *Kent*, for the Plaintiffs, argued that it was a breach of trust in *Richard Porter* to allow the trust money to be placed under the sole control of his co-trustee *Thomas*; *Trutch v. Lamprell* (a). That it was also a breach of trust to place it in the hands of the solicitors, and to take a second and insufficient security for it; *Thompson v. Finch* (b).

Mr. *Selwyn* and Mr. *Prendergast* for the Defendant *Richard Porter*, argued that he had acted only for conformity, and was protected by the trustee indemnity clause. That the estate of *Thomas* was alone subject to any liability, for he had been entrusted by the persons interested, who were all competent to act for themselves; and lastly, that as the parties had concurred and acquiesced in the transactions complained of, their interests were liable to indemnify the trustees; *Trafford v. Boehm* (c); *Raby v. Ridehalgh* (d).

Mr. *Stiffe* for the other Defendant.

Mr. *R. Palmer* was not called on to reply.

*The*

(a) 20 *Beav.* 116.  
 (b) 22 *Beav.* 316.

(c) 3 *Atk.* 444.  
 (d) 7 *De G., M. & G.* 104.

*The MASTER of the ROLLS.*

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GRIFFITH  
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Although I fully concur in the observation that this is a case of great hardship, and that there is not the slightest imputation on the moral conduct or probity of the Defendant, yet, in my opinion, the rules of this Court are imperative as to the decree which must be pronounced.

It has been justly observed, that the Court will not visit a trustee with the consequences of a breach of trust, committed with the sanction or by the desire of the *cestui que trust*, or of one committed without the sanction or desire of the *cestui que trust*, if, when it comes to his knowledge, he has acquiesced and obtained the benefit of it for a long period.

Fully assenting to that proposition, it is important, in the first instance, to consider what is the breach of trust in this case, and how far the statement of the Defendant *Richard Porter* amounts to an allegation that that breach of trust was acquiesced in. The breach of trust in this case was not the investing the 1,500*l.* For the investment in the second mortgage was a mere colorable proceeding on the part of Messrs. *Selby* and *Norton*, when at the last, being called upon to produce some security for the money, they produced this species of security. The breach of trust, therefore, was this, not merely in not investing the 1,500*l.*, but in lending the money to Messrs. *Selby* and *Norton*, and giving them the entire and complete control over the fund until a proper and eligible security could be found. That is the breach of trust which has been committed in this case, and it stands exactly in the same situation as if no security at all had been given by Messrs. *Selby* and *Norton*.

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 PORTER.

The way in which the Defendant *Richard Porter* has stated the case appears to me to confirm that view. His statement, and I am proceeding now on his evidence alone, is to this effect: he objected to this investment on mortgage, whereupon the *cestuis que trust*, who were perfectly competent to consent, said it should be invested on mortgage by *Thomas Porter*. Assuming that to be the fact, (and I am not going into the evidence that is given to contradict that statement,) and that in consequence of that wish, *Thomas Porter* had exercised his judgment in the best manner he could, and had selected a mortgage which turned out insufficient, then, on the authority of *Raby v. Ridehalgh* (a), *Richard* might not be liable; for the *cestuis que trust* having sanctioned one trustee alone exercising his judgment on the matter of investment, and he having exercised it, erroneously but fairly, they could not afterwards complain. It was their own act in not relying upon the judgment of the two trustees, the benefit of which the will had given them a right to have: they selected one trustee to act for them, and could not afterwards complain that he acted erroneously, so far as the other trustee is concerned, whose judgment they expressly relinquished. That I take to be the authority of the case of *Raby v. Ridehalgh*.

But there is this great and material difference between that case and the present: it does not appear that in that case the trustees gave Mr. *Robinson* the money, and that he gave the security afterwards as a mere shift, for the purpose of saying, when called on to give some security, "this is the best security I can give." But the security was given at the time when the advance was made.

Then

(a) 7 De G., M. & G. 104.

Then the statement contained in the subsequent paragraph of Mr. *R. Porter's* affidavit (if it is to be taken to be correct) amounts to this:—That the judgment of Messrs. *Selby* and *Norton* was to govern the judgment of *Thomas Porter*, or of himself *R. Porter*, in the selection of a mortgage. But it is obvious that this is not the event that has occurred. No security was ever suggested by *Selby* and *Norton* to either of the trustees, nor had they been advised by *Selby* and *Norton* that this would be a fit and proper security to take. In fact, as I said at the outset, they have exercised no judgment in the case; but the breach of trust is, that they lent the money to *Selby* and *Norton* until a good and proper security could be obtained, and this security was not taken in the execution of the trust, but was a mere subterfuge of the solicitors, to whom the money had been lent, who, when pressed, gave the best security they could for money which they were unable to repay. If I take the subsequent statement of *Richard Porter* to be true, the conduct of *Henry Porter* and his children does not amount to an acquiescence in a breach of trust, stated and explained to them; but, on the contrary, all that the *cestuis que trust* could have understood was, not that the trustees had lost any portion of their control over the fund, but that they were adopting such measures as they thought desirable, for the purpose of carrying into effect the wish of the *cestuis que trust*, by investing this sum of money on mortgage. That being the view I take of this case, it is impossible to say that there was a sanction to the proceeding before it was done.

Then as to acquiescence, there has been none on the part of anybody; for the trustees very laudably, in my opinion, have been striving, ever since they found that no effective mortgage was likely to be given, to

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get the money back from *Selby* and *Norton*; and the *cestuis que trust* have, during the whole time, been complaining that they would probably lose the money by reason of the failure of *Selby* and *Norton*. That is no acquiescence in the loan to them—it is no acquiescence in the breach of trust, which, in my opinion, constitutes the principal offence.

Regretting, therefore, as I do, very much, the necessity that the Court is under, I have no option but to say, that both *Richard Porter* and the estate of *Thomas Porter* are jointly and severally liable to make good the 1,500*l.* with interest at 4*l.* per cent.

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The tenant for life had received 5*l.* per cent. on the mortgage down to the 6th of *February*, 1855.

*The MASTER of the ROLLS* held, that he was entitled to 4*l.* per cent. only from the beginning, and that the *extra 1l.* per cent. must be taken as part of the subsequent interest.

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1858.

*Re* THOMPSON and DEBENHAM.

Feb. 24.

**B**Y an order made on the petition of Mr. *Downham* and eight other persons, on the 9th of *June*, 1847, the bill of costs of Messrs. *Thompson* and *Debenham* was ordered to be taxed on the usual terms. The Master on the 29th of *January*, 1858, certified that 1,293*l.* 16*s.* was due to the solicitors. The certificate having been served and demand made, the Court, on the 17th of *February*, 1858, ordered that Mr. *Downham* and two of the other persons should pay the amount in seven days after service.

An order was made for taxation, nominally on the petition and undertaking of *A. B.* and others. The certificate was made ten years after, and an order was then made on *A. B.* to pay. *A. B.* applied to discharge the order for payment, showing that the order had been obtained without his authority and during his absence from *England*. Held, that while the order for taxation stood, the order for payment was regular; but what his remedy might be, *quære*.

It was now moved, on behalf of Mr. *Downham*, that the order of the 17th of *February*, 1858, might, as regarded him, be discharged or varied.

The application was supported by an affidavit of Mr. *Downham*, in which he stated as follows :—

“ I believe the bills of fees and disbursements of the said *Thompson* and *Debenham* were incurred in relation to a defunct railway scheme, called *The Great Manchester Railway Company*, of which, it is alleged, I was one of the managing committee. I retired from such committee of management, by written notice, in the month of *March*, 1846, and since that period, my connexion with the said company entirely ceased, and I never, subsequently thereto, in any way acted in the affairs thereof.

“ The service of the certificate and power of attorney was the first intimation I ever had of the existence of  
the

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Re  
THOMPSON  
and  
DEBENHAM.

the present matter, or of any proceedings therein, and I was previously wholly ignorant of the fact, that a petition had been presented to this honorable Court in the said matter, in which my name appeared as one of the petitioners, and that an order had been made thereon, or that any proceedings or transaction had been taken thereunder, and I stated these facts to the person who served me with the certificate and power of attorney and made the said demand of payment.

"I left *England* in the month of *April*, 1846, and did not return until the month of *July*, 1848, and I was therefore not in this country at the time the said order bears date, namely the 9th day of *June*, 1847. I never authorized or employed directly or indirectly any person or persons to present the said petition in this matter, or to tax the bills of the said *Thompson* and *Debenham*, or ever sanctioned or concurred in such a proceeding.

"I was not originally on the said committee of management of the said *Great Manchester Railway Company*, and was no party to the appointment of *Thompson* and *Debenham* as solicitors of the said project."

Mr. *H. Stevens*, in support of the application, argued that a taxation had taken place wholly without the authority of Mr. *Downham* and in his absence, and that it would be unjust to compel him to pay a sum which had been found due from him in his absence, in a proceeding which he had neither sanctioned or been a party to.

Mr. *Giffard* and Mr. *Cole*, junior, were not heard.

*The*

*The MASTER of the ROLLS.*

1858.



*Re*  
**THOMPSON**  
 and  
**DEBENHAM.**

If a solicitor were to file a bill in the name of a client without his authority and it were dismissed with costs, I am afraid (though it is a very hard case) that the remedy would lie against the person in whose name the bill was filed.

*Mr. Downham*, as soon as he heard of this order, ought to have moved to have his name struck out of it; but what his remedy might be in such a case I do not say.

Here is an order for taxation, made on the application and in the names of *Mr. Downham* and eight other persons. That is a proceeding which, in this Court, is as substantive as a bill, and this is accompanied by an undertaking to pay whatever may be found due to the solicitors. This order is certainly eleven years old, but as long as it stands, the order referring the bill to the taxing master, his certificate, and the whole subsequent proceedings are perfectly regular and proper. This motion must therefore be refused with costs.

I suppose that there being nine persons liable, Messrs. *Thompson* and *Debenham* only require *Mr. Downham* to pay one-ninth.

*Mr. Stevens.* No; they have singled out three, and require them to pay the whole.

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NOTE.—See *Wade v. Stanley*, 1 Jac. & W. 674; *Dundas v. Dutens*, 2 Cox, 235; *Bligh v. Tredgett*, 5 De G. & Sm. 74; *Hood v. Phillips*, 6 Beav. 176.

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JAMES LIGHT (a Person of Weak Mind) by his  
Next Friend v. LIGHT.

*March 1.*

Jurisdiction of the Court to entertain a suit instituted in the name of a person of weak mind by a next friend.

Decree made in such a suit for the protection of the Plaintiff's property, and liberty given to apply in lunacy as to its application.

THE testator devised an estate to his son, *Richard Light*, charged with an annuity of 25*l.* a year, payable during the life of his son *James Light*, and he directed his executors to apply the annuity "for the support of his son *James Light*, in such manner as they might think best for his personal comfort."

The testator devised another estate to his son *John Light*, charged with the payment to his executors of an annuity of 25*l.*, similar to the other annuity and to be applied for the benefit of *James Light*.

The testator died in 1836, and his executors, *Richard Light* and *John Light*, proved his will.

*James Light* had, for many years previous to the testator's death, been and he still continued to be a person of weak mind, and the Defendant admitted him to be incompetent for the government of himself or his property.

Disagreements took place in the family, as to the Plaintiff's residence, &c., and the annuity due from *John Light* fell into arrear.

A bill was filed by *James Light*, described as "a person of weak mind, by *Samuel Purkess*, next friend," against the executors, praying:—

1. That the trusts of the testator's will, so far as regarded the payment and application, for the support and

and benefit of the Plaintiff, of the two annuities of 25*l.*, might be carried into execution.

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v.  
*Light.*

2. That an account might be taken of the arrears of the annuities, after deducting all sums expended by the Defendants for the support or benefit of the Plaintiff; and that the Defendants might be ordered to pay.

3. That the arrears might be "secured and applied for the support and benefit of the Plaintiff, in such manner as this honorable Court should think fit to direct, and for a receiver."

*John Light*, by his answer, raised the following objection to the suit:—"I say that the Plaintiff is above the age of twenty-one years, and I submit to the judgment of this honorable Court, that the Plaintiff is not entitled to sue by a next friend. I believe that *Samuel Purkess* has not been appointed next friend of the Plaintiff by any competent authority, nor has the sanction of the Lord Chancellor or the Lords Justices in Lunacy been obtained, to authorize the institution of this suit. And I submit, that the Plaintiff, being of unsound mind, is incapable of suing in this Court, except by a committee duly appointed in lunacy; and I claim the same benefit of this objection to the Plaintiff's bill as if I had pleaded thereto in abatement of the said suit."

The cause now came on for hearing.

Mr. *Lloyd* and Mr. *Rodwell*, for the Plaintiff, argued, "that persons incapable of acting for themselves, though not idiots or lunatics or infants, *have been permitted to sue by their next friend*, without the intervention of the Attorney-

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Attorney-General:" *Redesdale* (a), and *Re Liney* there cited; *Daniel's Pr.* (b); and that therefore this record was properly framed.

They asked that the arrears and future payments might be paid into Court.

Mr. *Edward F. Smith* for *John Light*.

A person of weak mind cannot, like an infant, sue by his next friend. The point was discussed in a case of *Mahins v. Thompson* in *March*, 1848, before the Vice-Chancellor of *England*, who intimated that he was prepared to take such a bill off the file, but the case went off on the merits. A person unable to sue is equally unable to authorize the filing a bill by a next friend in his name. Mr. *Purkess* has received no appointment to act from any competent authority, and no person has a right, of his own authority, to constitute himself the guardian or next friend of another person who is adult; such bills, filed without authority, have been ordered to be taken off the file; *Blake v. Smith* (c), and see *Wartnaby v. Wartnaby* (d).

[*The MASTER of the ROLLS.* But would it not be proper to secure the Plaintiff's annuity for the future? If I were now to give way to the objection, it would be injurious to all parties; besides, the Defendant here has neither demurred to the bill, nor moved to take it off the file.]

Mr. *E. F. Smith.* But the Defendant has raised the point by his answer.

Secondly.

(a) *Page 30 (4th edit.)*

(b) *Page 91 (2nd edit.)*

(c) *Younge, 594.*

(d) *Jacob, 377.*

Secondly. If the Plaintiff be a lunatic, the Crown alone, by its prerogative, has authority to interfere, for the purpose of protecting his property. In the case of a lunatic, where there has been no grant of the custody of the person, the Attorney-General, by virtue of that prerogative right, has alone the power to proceed and to file an information; *Redesdale (a)*; *Attorney-General v. The Corporation of Dublin (b)*.

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But a person is not to be treated as a lunatic except upon the finding of a jury, unless under the recent Acts and General Orders, the provisions of which must be strictly followed; 8 & 9 Vict. c. 100, ss. 90, 94, 95; 16 & 17 Vict. c. 70, ss. 104, 153; *General Orders of 7th November, 1853*; and the Plaintiff's present state of mind would not warrant the finding that he is lunatic; *In re Holmes (c)*.

One of the first principles in the administration of justice is, that the party interested ought to be served and to have an opportunity of contesting the fact alleged of his incompetency. The Court has repeatedly declined to interfere with the property of alleged lunatics until they have been so found by inquisition; *Ex parte Ridgway (d)*; *Gillbee v. Gillbee (e)*. The present interference with the rights of the Plaintiff is an infringement on the jurisdiction of the Lord Chancellor and Lords Justices sitting in Lunacy, and an attempt to change the jurisdiction from lunacy into chancery. He also referred to *Wentworth v. Tubb (f)*; and see *Williams v. Wentworth (g)*; *Nelson v. Duncombe (h)*.

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(a) *Page* 29.

(b) 1 *Bligh (N. S.)*, 347, 348.

(c) 4 *Russ.* 182.

(d) 5 *Russ.* 152.

(e) 1 *Phillips*, 121.

(f) 1 *Younge & C. (C. C.)* 171.

(g) 5 *Beav.* 325.

(h) 9 *Beav.* 211.

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There is a great deal of force in many of the observations made by Mr. *Smith*, still I think it proper to make a decree for the benefit of the Plaintiff, who is entitled to the protection of this Court.

I can refer it to chambers to ascertain what is due to the Plaintiff in respect of arrears of two annuities of 25*l.*, and also to ascertain what, if anything, is due from the Plaintiff to the Defendants, or to any and what other person in respect of money applied for his support and maintenance since death of testator; the accounts must be co-extensive. I will direct the arrears of the annuity due from the Defendant *John*, and also the growing payments of the annuity to be paid into Court to the account of the Plaintiff, and I will give liberty to the Plaintiff to apply to the Lord Chancellor or Lords Justices, to see how the money in Court is to be applied.

NOTE.—A sum of 375*l.* was found due to the Plaintiff in respect of *John's* annuity, and a sum of 362*l.* : 10*s.* due from the Plaintiff to *Richard* for maintenance. The cause came on for further consideration and upon a petition, before the Lords Justices, on the 22*nd* December, 1858, when the annuities were ordered to be paid for the future to two gentlemen, they undertaking to apply the same for the support and personal comfort of the Plaintiff.

See *Conduit v. Soane*, 5 *Myl. & Craig*, 111; *In re Berry*, 13 *Beav.* 455; *Re Irby*, 17 *Beav.* 334.

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MORLEY v. MORLEY.

THE Defendant, *Wm. Morley* the elder, was entitled to some leasehold premises in the city, and he mortgaged them to *Sykes* for 8,000*l.* by an indenture dated the 20th of *January*, 1835.

Subsequently *Wm. Morley* the elder, by an informal instrument, mortgaged the same premises to the two Plaintiffs for 11,332*l.* 5*s.* 9*d.* by an indenture dated the 5th of *November*, 1846.

Wm. Morley the elder afterwards became indebted to the Plaintiffs in the further sum of 17,682*l.* 3*s.* 10*d.*, making in the whole the sum of 29,014*l.* 9*s.* 7*d.*

In consequence, principally, of the non-payment of this large debt, the Plaintiffs suspended their payments, and entered into a compromise with their creditors, whereby they agreed to pay 12*s.* in the pound (which they did), and to assign to trustees for the benefit of their creditors the debt due from *Wm. Morley* the elder, and all security for the same (except as hereinafter mentioned). It was also agreed, that the Plaintiffs should, on payment of such composition, be released from their said debts, and (as they alleged) be entitled to retain, as against such creditors, the mortgaged premises, on part of which they carried on their business.

Accordingly, in pursuance of such arrangement, an indenture, that as against a subsequent judgment creditor of *W. M.*, the Plaintiffs could maintain a bill to foreclose the mortgage.

Trustees of a creditor deed held sufficiently to represent all the creditors in a suit to foreclose.

March 3, 4.

Effect of assigning a mortgage debt, reserving the securities.

W. M., in 1846, mortgaged some property to the Plaintiffs, for securing a debt of 11,300*l.* In 1857, the Plaintiffs assigned to trustees, for their creditors, this and another debt due from *W. M.*, and all securities for the same (except the mortgage of 1846, and the premises thereby assigned, and the benefit and advantage to arise therefrom). The surplus was to be paid to the Plaintiffs, and there was a proviso, that the Plaintiffs were to have the property comprised in the mortgage for their own benefit. Held,

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indenture, dated the 29th day of *November*, 1847, was made and executed between and by the Plaintiffs of the one part, and the Defendants *Deacon* and *Shillingford* of the other part, whereby, after reciting that the Plaintiffs had become indebted to the several persons named in the schedules, in the several sums set opposite their names, and were unable to pay them in full; and also reciting, that the said *William Morley* the elder was indebted to the Plaintiffs in the sum of 29,014*l.* 9*s.* 7*d.*, and the agreement to pay a composition of 12*s.* in the pound upon the debts; and by way of *further payment* to their creditors, the Plaintiffs had proposed to and agreed to assign the debt due from *William Morley* the elder unto *Deacon* and *Shillingford*, upon trust for the equal benefit of all the said creditors, as thereafter expressed; and after also reciting that the Plaintiffs had agreed to assign the said debt so due from *William Morley* the elder, “with all securities for the same, *save as therein-after mentioned*, unto the Defendants *Deacon* and *Shillingford* upon the trusts and for the intents and purposes thereafter expressed:” it was witnessed, that in pursuance of the said agreement, the Plaintiffs assigned all that the said principal sum of 29,014*l.* 9*s.* 7*d.*, then due from *William Morley* the elder, “and all interest due and to grow due for the same principal moneys, and all bonds, bills and other securities for the same principal moneys and interest (“*save and except by certain indentures of mortgage bearing date the 5th day of November, 1846, and the premises thereby assured to the said James Morley and William Morley parties hereto, and the benefit and advantage to arise therefrom*”) unto *Deacon* and *Shillingford* upon trust, with all convenient speed, to receive and get in the said principal moneys and premises thereby assigned, and to apply the money received in payment of all the debts enumerated in the schedules, rateably and in proportion, and subject thereto  
 upon

upon trust for the Plaintiffs. And after various other clauses and covenants, the indenture contained a clause in the words following:—"Provided always, and it is hereby declared and agreed, that notwithstanding anything hereinbefore contained, it shall and may be lawful to and for the Plaintiffs to have, receive, and take, for their own use and benefit, all the property comprised in the said before-mentioned indenture of mortgage of the 5th day of *November*, 1846, and all benefit and advantage thereof."

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The Plaintiffs afterwards paid off *Sykes'* mortgage for 8,000*l.*, and it was transferred to them by indenture dated the 7th of *May*, 1857.

In *January*, 1857, the Defendant *Overbury* obtained a judgment against the mortgagor, *Wm. Morley* the elder, for 3,000*l.* which was afterwards duly registered.

The Plaintiffs filed this bill against *Wm. Morley* the elder, *Overbury*, and the two trustees of the creditors' deed, praying that an account might be taken of what was due and owing for principal and interest on the several mortgage securities of the 20th day of *January*, 1835, and the 5th day of *November*, 1846, respectively; and also an account of the rents received by the Plaintiffs, they submitting to be charged with a fair occupation rent. And that the Defendants *William Morley* the elder and *Overbury* might be decreed to pay to the Plaintiffs what should be found due to them upon the account with costs, or in default, that they might stand foreclosed.

Mr. *R. Palmer* and Mr. *C. C. Barber* for the Plaintiffs, argued, first, that the mortgage debt itself of 11,332*l.* 5*s.* 9*d.* did not pass by the deed of 1847; and, secondly, that if it did, the Plaintiffs, in respect
of

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of the reservation of the mortgaged estate contained in that deed and of their rights to any ultimate surplus, were entitled to maintain a suit for foreclosure and redemption. They cited *Watts v. Syms* (a) to shew that the debt was not extinguished.

Mr. *Hemming* for *Wm. Morley* the elder.

Mr. *Greene*, for the trustees of the creditors' deed, made no claim as against the mortgaged property.

Mr. *Follett*, Mr. *Kenyon*, and Mr. *C. Browne* for *Overbury*, the judgment creditor. First, the debt and the security for the debt were inseparable; the whole debt of 29,014*l.* 9*s.* 7*d.* passed to the trustees by the composition deed, and the Plaintiffs, though they reserved the mortgage securities when they parted with the mortgage debt, retained no right to institute a foreclosure suit in respect of a security, which could only be founded on the debt which they had assigned. The judgment debt is, therefore, the second incumbrance, and *Overbury* is entitled to redeem the Plaintiffs, on payment simply of what is due on the mortgage of the 12th of *January*, 1835. Secondly, the creditors are not sufficiently represented in this suit; some, at least, of them ought to be made parties; *Tuder v. Morris* (b); *Goldsmid v. Stonehewer* (c); *Stansfield v. Hobson* (d); *Young v. Ward* (e).

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March 4. It is undoubtedly a matter of great importance that the Defendant *Overbury* should be certain, that the persons who file the bill to redeem and foreclose are the persons entitled to do so, and that depends upon the construction

(a) 1 *De Gez*, M. & G. 240.
 (b) 1 *Small & G.* 503.
 (c) 9 *Hare*, App. xxxviii.

(d) 16 *Beav.* 189.
 (e) 10 *Hare*, App. lviii.

construction proper to be placed on the deed of 1847, which is lost.

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The view I take of this case is, that whether the Plaintiffs' or Defendant's construction of this deed be adopted, the Plaintiffs are the persons entitled, unless they are redeemed, to foreclose this mortgage. The deed of 1847 is certainly very singularly framed, and the question on it appears to have arisen from alterations made in the draft as originally drawn. The creditors were to receive 12*s.* in the pound, which has been paid, and in addition, the deed conveyed to the trustees the debt, for the benefit of the creditors, after payment of whom, the Plaintiffs were to receive the surplus. If the deed had remained *simpliciter* in that form, or if the debt had been assigned with all the securities relating to it, it would have carried this mortgage with it. But the deed is not in that form. In the first recital with respect to it these words are introduced :—" With all securities for the same, save as hereinafter mentioned." Now, if the construction of the Plaintiffs be right, that is if the 11,000*l.* (a portion of the 29,000*l.*) did not pass to the trustees, *cadit questio* and no question at all arises upon the deed. Therefore, the observations I am about to make are upon the assumption that the construction of the deed is that which Mr. *Overbury* places upon it. In that view, the deed says that the securities for this debt are to be assigned "save as hereinafter mentioned," and this is afterwards explained to be, that "all bonds, bills and other securities for the same principal moneys and interest" are to be assigned, "save and except by certain indentures of mortgage, bearing date the 5th day of *November*, 1846, and the premises thereby assured to "the (Plaintiffs) parties hereto, and the benefit and advantage to arise therefrom."

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Well then this is clear, that the mortgage deed of 1846 is not assigned, and that the benefit and advantages to arise from it are to be reserved to the Plaintiffs, although the debt itself is assigned. If that be so, by what authority could the trustees afterwards make use of that deed for the purpose of bringing an action on the covenant contained in it or of filing a bill of foreclosure, if there is not only no assignment of it, but an express reservation to the Plaintiffs of the benefit and advantages arising therefrom.

Again, are the trustees, notwithstanding the proviso at the end of the deed reserving to the Plaintiffs the property comprised in the deed of 1846, at liberty to make use of that deed for purposes affecting the Plaintiff's possession? If they are, it would reduce these words in the deed to nothing, because even according to the construction put on it by Mr. *Follett* and Mr. *Kenyon*, they are not to derive the slightest advantage from that deed of 1846; and Mr. *Browne* admitted, that by the words of exception thus introduced, the trustees were barred from taking any step under this deed to affect the property. Adopting that view of the case, is not a bill to foreclose a step taken under this deed? and would not an action upon the covenant be another step taken under the deed? What would be the result, if this be the true construction? viz. if the whole of the debt and interest is assigned to the trustees for the benefit of the creditors, but the trustees have covenanted not to use this deed or make it available for the purposes of recovering the property? This would be the result: the Plaintiffs would then be the only persons who could enforce the deed, and would be trustees of the money recovered for the trustees of the creditors, and liable to account to them; but so far as any other person is concerned or interested in the property, the foreclosure or redemption

redemption would be perfect, and the title under it would be as complete as if they had proceeded for their own benefit, and were not liable, subsequently, to account to the trustees of the creditors' deed.

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I am, therefore, of opinion, that in whichever way this is looked at, the Plaintiffs are the persons who have a right to redeem all prior incumbrances and to foreclose all those subsequent to them.

This view of the matter shews, that, in my opinion, Mr. *Greene*, representing the trustees of the deed of 1827, also represents all the *cestuis que trust* under that deed, and that it is impossible for any one to require that those persons should be made parties to this suit, that would be so even under the old practice, and *à fortiori* by the new practice under the act for the reform and improvement of the equity jurisdiction.

The Plaintiffs, therefore, are entitled to the usual decree for foreclosure.

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ABSTRACT OF DECREE.

Usual right of redemption given to *Overbury* and Mr. *Morley* the elder, on payment to the Plaintiffs of what might be found due to them on their two securities of the 20th of *January*, 1835, and the 5th of *November*, 1846.

Usual foreclosure in default of redemption.—REG. LIS. 1857, B. fol. 828.



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## SIDNEY v. WILMER.

March 3, 6.

There is no case in which the contingent estate of a remainderman has been accelerated, for the purpose of giving him a right to rent accrued prior to the time when his estate took effect.

Where, therefore, an estate was limited to the children of A., born within fifteen years, with remainder to the Plaintiff, and A. had no child, and the fifteen years had not expired, it was held, that the Plaintiff had no right to the present rents.

An estate was devised to trustees for 500 years, with remainder to persons still unborn, with remainder to the Plaintiff. The trustees had active

duties as to the management of the estate and large discretionary powers, and they were authorized, "during the minority of any person absolutely or presumptively entitled," to apply the surplus income for the benefit of such person, accumulating the surplus. Held, that the Plaintiff, who had attained her majority, had no right to any part of the surplus rents accruing prior to her estate becoming vested in possession.

Power of maintenance of "the person for the time being entitled" to the estate, Held, to include persons "absolutely or presumptively entitled."

THE testator, Sir *Henry Hunloke*, having no issue, but having an uncle and two sisters, *Charlotte* and *Eliza*, by his will, dated in 1845, devised his real estates to trustees for 500 years, upon the trusts after mentioned.

"And after the expiration, or sooner determination of the said term, and in the meantime subject thereto and to the trusts thereof," to the use of the first and other sons of the testator's sister *Charlotte Hunloke* who should be born within fifteen years after the date of the will, successively, in tail male; with remainder to the use of the first and other sons of the testator's sister *Eliza* who should be born within eighteen years after the date of the will, successively, in tail male; with remainder to the use of the first and other daughters of the testator's sister *Charlotte Hunloke* who should be born within fifteen years after the date of the will, successively, in tail male; with remainder to the use of the first and other daughters of the testator's sister *Eliza* who should be born within eighteen years after the date of the will, successively, in tail male; with remainder to the use of the first and other daughters of the testator's sister *Charlotte Hunloke* who should be born within fifteen years after the date of the will, successively, in tail general; with remainder

mainder to the use of the first and other daughters of the testator's sister *Eliza* who should be born within eighteen years after the date of the will, successively, in tail general; with remainder to certain uses (which failed) of the sons (other than the eldest) of *Philip C. Lord de Lisle and Dudley*, and the sons of such sons. "And for default of such issue," to the use of every daughter of *Philip C. Lord de Lisle and Dudley* then born or thereafter to be born in the testator's lifetime (according to seniority of age) for her life; with remainder, after the decease of each such daughter, to the use of the first and other sons of each such daughter, successively, in tail male; with remainder to the use of the first and other sons of such daughters, successively, in tail general; the testator's will being that the eldest daughters of *Lord de Lisle and Dudley* born in the testator's lifetime, and her sons and the heirs male and heirs of their respective bodies, should take before the younger of such daughters and her sons and the heirs male and heirs of their respective bodies; with divers remainders over.

The testator declared, that the term of five hundred years was limited to the trustees, upon trust to enter upon his mansion-house and appurtenances, "during the lives of his uncle and sisters and the survivor, and during the minority of any person, who, at the decease of the survivor of his uncle and sisters, might, under the limitations of his will, be entitled, beneficially, to the possession of his estates and be under the age of twenty-one years, to receive and take the rents, and keep up the mansion-house, gardens and pleasure grounds, and manage his estates and direct any repairs and improvements to be made thereon. He authorized the trustees to pull down and re-build any of the buildings about *Wingerworth Hall*, and alter the gardens and shrubberies

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shrubberies "as might suit any tenant of the hall or with a view to ulterior beauty, utility or accommodation."

He also empowered them to grant leases, to appoint receivers, bailiffs, &c. to cut timber and underwood yearly, to expend 1,000*l.* a year in improvements, to dispose of 2,000*l.* a year in charities, and then to pay an annuity of 1,000*l.* a year to his uncle for life, and 500*l.* a year to each of his two sisters, and other annuities.

He then provided :—that the annuities hereby made payable to my uncle and sisters shall not entitle them to reside at my mansion-house of *Wingerworth*, unless authorized to do so by my trustees or trustee, or in any manner whatsoever to interfere in the management of my estates. And I also declare, that during the minority of any person for the time being absolutely or presumptively entitled, by virtue of this my will, to an estate for life or in tail, immediately expectant on the estate for the lives of my sisters, limited to trustees to preserve contingent remainders in the property hereby settled, it shall be lawful for the trustees or trustee for the time being of the said term of five hundred years, but subject and without prejudice to the annuities under this my will, or such of them as shall be payable, and to other charges, to pay and apply, during the lives of my sisters, a competent part of the surplus interest and income of the said estates to or for the maintenance and education, or otherwise for the benefit of the person for the time being entitled thereto, the said trustees and trustee accumulating the surplus and investing the same as they or he shall think best. He declared such accumulations should be subject to the same trusts as were thereby declared concerning the moneys to arise under the power of sale thereafter contained.

He authorized the trustees to purchase other hereditaments

ments and messuages, to raise money by mortgage to pay his debts, and he provided that the trusts thereby declared for the management of the estates should, after the death of his uncle and sisters, be suspended during the life of any adult person who should become entitled thereto for any estate for life, in possession, by virtue of his will, and should cease, when and so soon as his uncle and sisters should be dead and an adult tenant in tail, by purchase under his will, should become absolutely entitled thereto.

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Then followed a proviso for cesser of the term upon full performance of the trusts, with a power to the trustees, during the lives of his uncle and sisters and the survivor of them, and during such further period as his estates should not be vested in possession in an adult tenant for life or tenant in tail under his will, to lease the mansion and appurtenances for twenty-one years, with a like power to open and work mines, to grant mining leases, to sell or exchange (with the exception of the mansion, &c.)

The testator died in 1856, his uncle died four months afterwards, and neither of his sisters had, at present, any issue.

*Lord de Lisle and Dudley* died in the testator's lifetime, he had only one son and three daughters, the Plaintiff was the eldest daughter and had attained her majority in the testator's lifetime.

She instituted this suit, alleging as follows:—"In the events which have happened, the first beneficial estate, both in the real and residuary personalty devised and bequeathed by the testator's will, is the estate for life vested in the Plaintiff, subject nevertheless to be postponed, in the event of any children of the testator's sisters *Charlotte* and *Eliza* being born within such periods

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periods as will entitle them to take under the limitations prior to the Plaintiff's estate, which periods will expire respectively on the 4th of *July*, 1860, and the 4th of *July*, 1863. And the Plaintiff claims, as such first tenant for life, to be entitled, in the meantime, to the surplus rents of the real estate and the surplus income of the personal estate and any accumulations thereof, which may accrue or have accrued, during the period of suspense, from the testator's death until the contingency of any children capable of taking under the limitations of the will being born to the testator's sisters *Charlotte* and *Eliza*, respectively, shall have been determined, and to have the option of immediately entering into the actual occupation of the said mansion, park, grounds, gardens and appurtenances."

The bill prayed the administration of the estate, that it might be declared that the Plaintiff was entitled to the surplus rent and income of the testator's estate (after keeping down the interest of the charges thereon and the annuities given thereout by the testator's will) from the date of the testator's decease, and that the same might be paid accordingly; that it might be declared that the Plaintiff was entitled to occupy the mansion of *Wingerworth Hall*, with the park, grounds, gardens and appurtenances, and to have the option of entering upon such occupation forthwith, and that all proper directions might be given and made for giving effect to such declaration.

Mr. *Lloyd* and Mr. *Hemming* for the Plaintiffs, cited *Sidney v. Shelley* (a); *Morgan v. Morgan* (b).

Mr. *Stiffe*, for the husband and other trustees of the settlement, cited *Green v. Dunn* (c); 1 *Vict. c. 26, s. 25*.

Mr.

(a) 19 *Vesey*, 352.

(b) 4 *De G. & Sm.* 164.

(c) 20 *Beav.* 6.

Mr. *R. Palmer* and Mr. *Jessel* for the Defendant  
*Wilmer*, the trustee.

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*The MASTER of the ROLLS* reserved judgment.

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The Plaintiff claims, in the events which have happened, to be entitled to the surplus rents of the estate, after providing for those matters which the trustees are directed to perform. Her right to this must depend either on the trusts of the term of five hundred years, or upon the construction of the limitations in the will, which are made subject to that term. The construction of these ought to be kept distinct and separate, the scheme of the will being, first, to create the term of five hundred years, and then to limit the estate to different persons successively.

March 6.

The will commences with a recital which was much relied on, but which I think has but little weight upon the point which I have to determine. The testator says—"I have determined, subject to my sisters' or either of them having issue, on settling my estate in manner hereinafter contained, but making provisions for my uncle and sisters in a way which I hope they will appreciate."

It is clear from this, that the testator did not intend them to take any estates in the property, but merely certain annuities out of it, which he afterwards specifies. He then creates this term of five hundred years; and, subject to the term, and to limitations to trustees to preserve

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preserve contingent remainders, in the proper places, he gives the property to any child of his sister *Charlotte* who shall be born within fifteen years, and next to any child of his sister *Eliza* who shall be born within eighteen years. If either of the sisters had a child during the periods mentioned by the testator, that child was to take a vested estate tail; in default of such issue, he gives the property to the second son of *Lord de Lisle* for life, with remainder to his issue in tail, and after that, to the daughters of *Lord de Lisle* born in the testator's lifetime, for life, according to seniority, with remainder to their issue in tail. *Lord de Lisle* had no second son, and the Plaintiff is his eldest daughter. There have been no children whatever of the two sisters: one of them has died, and with respect to the other, in the course of five years, the period will elapse within which a child must be born, to enable that child to take under the will. That lady is now the Marchioness of *Casteja*, and it seems to be highly improbable that she will now have any child who will be able to take under the will. However, if she should have a child within the five years which still remains, that child will be entitled to the estate.

The question then is, whether, upon those limitations to the eldest daughter of *Lord de Lisle*, the Plaintiff can now be said to be entitled to the rents of the estate. She has, at present, a mere contingent estate, and I accede to the observations made upon that subject, on behalf of the trustee, that there is no case in which the estate of a remainderman has been accelerated, for the purpose of giving him a right to rent accrued prior to the time when his estate took effect. There is no estate whatever at present in this lady; it is doubtful whether there ever will be such an estate, and it would be impossible

impossible for this Court, in that state of circumstances, and upon the limitations contained in the will alone, to allow her to receive the rents of this property. It is unnecessary to refer to authorities, because it is contrary to all principle, that, under these circumstances, the contingent remainderman, whose estate may never take effect, should be allowed to have the enjoyment of the estate.

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If that be so, the next question is, whether, under the trusts of the term, this lady can take anything.

The trusts of the term are of this nature:—there is an express and direct trust that, at all events, the trustees are to receive and take the rents during the life and lives of the uncle and two sisters of the testator, and the life of the survivor, and during the minority of the person who may then be entitled. Therefore during that time, at least, their duties are not to cease. They are to receive and take the rents, and for what purpose? In the first place they are to keep up the mansion-house and the gardens; they are to manage the estates, they are to direct any repairs that may be proper to be done; there are considerable powers with respect to pulling down and rebuilding, and altering and improving the house and gardens in such manner as may suit any tenant of the hall. It apparently follows from this, that it would be their duty not merely to keep up the hall, but also to make it profitable, if possible, by letting. If so, it would be their duty to let it during the period that the term subsisted. That is inconsistent with the notion that any person presumptively entitled to the estate could be entitled to receive any portion of the rents.

This trust is followed immediately by a power to grant  
leases



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leases, to cut timber, and to expend a sum not exceeding 1,000*l.* a year in improvements; and to allow, in their discretion, a sum of 2,000*l.* out of the estate for certain charitable purposes, which, in my opinion, are void under the Statute of Mortmain. All this shews that the trustees had a discretion, during the whole of the continuance of the term, which was to last until the decease of the survivor of these three persons at all events.

Then, after specifying what annuities are to be paid to his uncle, sisters and other persons, there follows a proviso which was much relied upon by Mr. *Lloyd*, but which, in my opinion, bears a construction unfavourable to his view. The testator provides, that the annuities made payable to his uncle and sisters shall not entitle them to reside at his mansion-house at *Wingerworth*, unless authorized so to do by his trustees or trustee, or in any manner whatever to interfere with the management of his estates. It is said, that this is an express exclusion of the sisters and uncle from residing at the hall, unless under the authority of the trustees, which is true. But by what fair rule of construction can this be converted into any expression of a wish that the person who may be presumptively entitled to the estate upon the determination of the term shall be allowed, before that time, to be in possession or in occupation of the house? Because such possession would necessarily follow, if that person is to be in receipt of the rents. All that it shews is, that the entire control and discretion over the whole matter is to rest with the trustees; that it is for them to determine whom they will allow to remain there, whether it shall be let to a tenant, or (if they please to allow it) whether it shall be occupied by the two sisters or by the uncle of the testator. But if the Plaintiff has, under construction of trust of this term,

term, a right to reside at the hall, how is such right compatible with the trust, that the surviving trustee, if he shall think fit, may now authorize the testator's sister to reside at the hall. If he should do so, which of the two is to reside there? Here is an express power to the trustee to authorize the residence of any one of the three persons he shall think fit, and a direction that they shall not occupy it, unless by such authority; this is wholly inconsistent with any other person having the right to reside there. A clause follows immediately after, which has been the principal subject of discussion; it is the clause directing the accumulation, and this is a clause which begins thus:—  
 "I also declare, that during the minority of any person for the time being absolutely or presumptively entitled, by virtue of this my will, to an estate for life or in tail immediately expectant on the estate for the lives of my sisters limited to trustees to preserve contingent remainders, it shall be lawful for the trustees" of the term of 500 years to apply any portion of the surplus interest and income of his estates to or for the maintenance and education or otherwise for the benefit of the person for the time being entitled thereto.

I expressed my opinion, which is confirmed by further reading the will, that the words "entitled thereto" mean "so entitled thereto;" it means therefore either absolutely or presumptively entitled, and this no doubt gives a power, in case the Plaintiff were a minor, to the trustees, if in their discretion they thought it desirable, to apply a sum of money for her maintenance and education or otherwise for her benefit. But it stops there, and is wholly inconsistent with the notion, that, because this power is given to the trustees during the Plaintiff's minority, she would be entitled, upon attaining twenty-one, to the absolute interest in the rents.

Mr.

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 W.
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Mr. *Lloyd* contended, that the words "during the minority," &c. governed the remainder of the sentence, directing the accumulation of the surplus. Those words are certainly very obscure; do they mean that the trustees are to accumulate the surplus only "during the minority of any person for the time being absolutely or presumptively entitled," or do they mean that the trustees are to accumulate the surplus so long as the trusts of the term last, and whether there be a minority or not? Mr. *Lloyd* read the word "surplus" as the "surplus" previously mentioned, namely, the surplus income of the estate after making the payments therebefore directed and permitted to be made by the trustees, according to their discretion; and that out of this surplus they were to allow a certain sum for maintenance of an infant presumptively entitled, and that during the minority of that infant only were they to accumulate the surplus. Nobody can dispute that it is susceptible of that mode of reading, and that it is not a strained or forced construction.

Mr. *Palmer*, on the other hand, contends, that the word "surplus" has the same meaning as the word "surplus" had in the former branch of the sentence, and that it means out of the surplus rents during the whole term, that is, the surplus after the fixed and permitted payments by the trustees:—that they are to accumulate the surplus, deducting the maintenance, if maintenance is allowed, and without such deduction if maintenance be not allowed.

I must say also, that this appears to me to be a perfectly fair and natural construction of that sentence. Which of the two is to prevail can only be ascertained by looking at the rest of the will, and upon looking at the rest of the will, the passages which I have already referred

ferred to—the power to purchase, the power to pay off any debts affecting the estate, all of which are to exist during the continuance of the term, which last till the death of the survivor of three named persons, I think that the only construction consistent with those trusts is, that the accumulation should take place of all the surplus rents not required for the purposes directed by the testator during the continuance of the term; consequently the result will be, that they will be accumulated for the benefit of the first tenant for life, who will take the interest of it, if she survives to enjoy the estate, and for the benefit of the first tenant in tail, who will take the corpus of the fund accumulated.

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Such is the view I take of this case, and I have thought it desirable to express it, because the heir-at-law does not appear here, and in my opinion, upon this view of the case, the only question will be between the heir-at-law and the person who would be presumptively or absolutely entitled to the estate, because, in no way of looking at it, do I think that the trusts of the term would authorize the payment of that surplus to the Plaintiff upon the present occasion.

I will make a declaration to the effect I have stated.

1850.

ROBERT L. WATKINS, Official Manager.

March 1. A. D.
By a policy
of the stock
of the said
company were
some issue.
And that the
representatives
of the insured
were entitled
to one equity
to make the
rights avail-
able, worth-
standing the
company was
being wound
up.

IN 1854, John Johnson effected an insurance on his life with The *London & Lancashire Life Assurance and Loan Company*, for £1000. The policy, which was signed by three of the directors, provided as follows:—"Pro-
vided nevertheless, that the stock, funds and property of the said company and the security thereof, and so much capital of the said company, for the time being, held in shares, as shall not have been then paid up and applied in discharge of subject to all prior claims and demands) shall none be liable to answer all claims and demands in respect of this policy, nor that neither the directors in giving this policy, nor any of them, nor any other director or officer for the time being of the said company, or their respective executors or administrators, nor any other proprietor or holder of shares in the capital of the said company, nor any other member thereof, shall be personally or individually liable to any such claim or demand, in any action, suit or other proceeding at law or in equity, nor to any contributions to such claim or demand, except so far as the share or shares then held by him, her or them in the said capital shall not, for the time being, have been paid up or required to satisfy all such prior claims or demands as aforesaid. And that upon the legal transfer, by any shareholder, in accordance with the provisions of the deed of settlement of the said company, of any share or shares, the transferee or transferees thereof, and not the transferring proprietor or proprietors, shall be answerable for such unpaid part of such share or shares in the said capital."

The company was duly registered under the 7 & 8
Vict.

Vict. c. 110, but was unable to continue its business; thereupon another registered company, called *The London and County Assurance Company*, in 1855, adopted the policy and took the risk of it, subject to the conditions therein expressed, and the bill stated, that it was authorized to do so by its deed of settlement.

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John Robson died in 1855, and in 1856, the Plaintiff (his executrix) brought an action at law against *The London and County Assurance Company* to recover the 600*l.*, and in *July*, 1856, she obtained a verdict for the amount. She caused a *fi. fa.* to issue, to which the sheriff returned *nulla bona*, and the Plaintiff, as she stated, "had no effectual remedy at law."

In *November*, 1856, an order was made for winding up the last-mentioned company, and the Defendant was appointed official manager. The Plaintiff went in and substantiated her claim before the Master, and being still unable to obtain payment, she filed the present bill against the official manager alone, stating the above circumstances and alleging as follows:—"The Plaintiff has frequently applied to and requested the Defendant to pay her the amount of her said claim, or to take the necessary steps for making a call on the contributories of the same company liable to such claim, but he has always refused and still refuses to comply with such requests. As an excuse for such refusal, the Defendant alleges, that there are no funds available for the discharge of the said claim, and that no such call would be of any effect, and that his costs exceed the amount capable of being realized by any call on the contributories of the said company."

"The Plaintiff, however, charges the contrary of such allegations to be the fact, and as evidence thereof, the

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ROBSON

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M'CREIGHT.

Plaintiff sheweth, that by the prospectus of the *London and County Assurance Company*, issued by the said company, with the approval of the shareholders thereof, to the said *John Robson*, and upon the faith of which prospectus he agreed to the adoption, by the same company, of the said policy as aforesaid, it appears, that the capital of the company consisted of 100,000*l.* in 20,000 shares of 5*l.* each, and the Plaintiff charges, that a large number of shares has, from the time of the death of the said *John Robson*, been held by contributories to the same company liable to the Plaintiff's claim, upon which shares only a nominal sum has hitherto been paid up, and that the said Defendant has or might or ought to have in his hands ample funds applicable to the discharge of the Plaintiff's claim."

The bill prayed, that it might be declared that on the said 15th day of *August*, 1856, the funds and property, including the capital not paid up, held in shares of the said *London and County Assurance Company*, became charged with and liable to the payment of the sum of 300*l.* to the Plaintiff, and that the Defendant might be decreed to pay the same sum to the Plaintiff accordingly, together with interest thereon and her costs of this suit and of the said judgment and execution at law, and that such decree might be enforced against every contributory of the said company, to the extent of his legal or equitable liability in respect of the Plaintiff's claim, and that for the purpose aforesaid, all proper inquiries and directions might be made and given.

To this bill the official manager filed a general demurrer for want of equity.

Mr. *Selwyn* and Mr. *J. J. Hamilton Humphreys*, in
support

support of the demurrer. No decree can be made at the hearing of the cause, for no part of the relief asked by the prayer of this bill can be then granted. The relief asked is, a declaration of the Plaintiff's right that the funds and property of the company are liable, and secondly, that the official manager may be decreed to pay the amount due. The declaration is useless, it is no more than is expressed on the policy, it is not in dispute, and has been determined in the action.

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 M'CREIGHT.

Next, it will be impossible to make any decree against the official manager for payment. He is a mere officer of the Court in the nature of a receiver, with limited duties and restricted powers. He can do nothing except under the direction of the Master or the Judge charged with the winding-up of the company, and can make no payment except by their order; 11 & 12 *Vict. c. 45*.

2. The Plaintiff ought to go in and obtain payment in the winding-up proceedings. Her rights being ascertained under the 71st section, she will obtain payment under the 82nd section. All the funds which are liable to the Plaintiff in the hands of the official manager are under the control of the Master, and not of this branch of the Court.

3. But by the 20 & 21 *Vict. c. 78, s. 1*, the creditors may obtain the appointment of a creditors' representative, whereby they will all become parties to the winding-up, and they cannot proceed without leave of the Court; *sect. 7*.

They cited *M'Kenzie v. The Sligo, &c. Company (a)*.
 Mr.

(a) 4 *Ellis & B.* 119.

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Mr. *R. Palmer* and Mr. *Marten*, in support of the bill. When a policy is framed like the present, making the estates, funds and property of the company alone liable, there is no remedy at law against the individual shareholders, and no execution could be issued against them under the 7 & 8 *Vict. c. 110, s. 68*; *Halket v. The Merchant Traders' Association* (a); *Hassell v. The Merchant Traders' Association* (b). The stocks, funds and property are charged with the amount, and it has been decided in *Law v. The London Indisputable Co.* (c), and *Thompson v. Norris* (d), that the insured and his representatives are entitled to come into this Court to make the charge effectual. The Plaintiff's rights are in no way affected by the winding-up acts, the object of which was "only to settle equities between the partners" and not "to delay the creditors until the rights of the parties had been ascertained;" *Ex parte Warkworth Dock Company* (e). The rights and remedies of the creditors are expressly reserved to them by the 11 & 12 *Vict. c. 45, s. 58*.

The suit is properly brought against the official manager; 11 & 12 *Vict. c. 45, ss. 50, 52, 56*; *Thompson v. Norris* (f); *Prichard's Case* (g); and he will be bound to compel the shareholders to pay up the whole amount of their shares, for which, under this sort of policy, they are still liable; *Cope's Case* (h); *Lord Talbot's Case* (i).

Lastly, no official representative has been appointed, and the appointment itself is discretionary, and only to
be

(a) 13 *Q. B. Rep.* 960.(b) 4 *Exch. Rep.* 525.(c) 1 *Kay & J.* 223.(d) 5 *De G. & Sm.* 686.(e) 18 *Beav.* 629.(f) 5 *De Gex & Sm.* 686.(g) 5 *De Gex, M. & G.* 484.(h) 1 *Sim. N. S.* 54.(i) 5 *De G. & Sm.* 386.

be made "if it shall seem expedient;" 20 & 2 Vict. c. 78, s. 1; the 7th section is therefore inapplicable.

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Mr. Selwyn in reply.

Smith v. The Hull Glass Company (a); Hill v. The London and County Company (b); Hallett v. Dowdall (c) were also referred to.

The MASTER of the ROLLS.—I will decide this to-morrow.

The MASTER of the ROLLS.

In this case, I think that on authority, the demurrer cannot be sustained. The only reasons upon which it can be sustained must be, either that the Plaintiff's remedy is at law, or that this suit is prevented by some of the enactments of the winding-up acts. With respect to proceeding at law, it was well pointed out, that the effect of this policy was to give a charge or lien on the property, stocks, funds, &c. of the company alone, and which can only be made effective in this Court. The case of *Law v. The London Indisputable Life Policy Company (d)* is a sufficient authority to shew, that the Plaintiff is entitled to come into this Court for the purpose of obtaining payment, whether she could or not have made her security available at law; and she would, if possible, have a greater right to do so, when it appears, as it does on this bill, that the proceedings at law have been found ineffectual.

10 March.

The

(a) 8 C. B. Rep. 668.

(b) *Hur. & N.* 398.

(c) 18 Q. B. Rep. 2.

(d) 1 *Kay & J.* 223.

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v.
M'CREIGHT.

The next question is, whether the winding-up acts prevent this proceeding? The first Act of Parliament, 11 & 12 *Vict.* c. 45, not only does not in terms restrict the rights of creditors to sue, but expressly reserves the right, and by the 58th section, all the rights and remedies of the creditors are expressly preserved to them, with this fetter, that they must not (s. 73) commence or proceed with any action until after they have proved or exhibited proof of their debts; this was to give an opportunity to the official manager to pay them, if it were thought necessary, and thereby stop all further proceedings. The object of this Act of Parliament was not to affect the rights of the creditors in the slightest degree, but to wind up and obtain contribution amongst the parties themselves, which it was impossible to do in the ordinary course of proceedings in a suit in this Court: a winding-up order was intended to have the effect of a decree between all the partners, making them all parties to the proceeding.

That being the state of the case under these Acts of Parliament, the question came before the Court, in one or two cases, whether the winding-up acts prevented the creditor from instituting proceedings in this Court for the recovery of his demand. The first case I was referred to, and which I cannot distinguish from the present, was the case of *Thompson v. Norris* (a), before Vice-Chancellor Sir *James Parker*. There the mortgagees of the company, being unable to obtain payment after a winding-up order, filed their bills against the official manager. It was held, upon demurrer, that the payment was properly enforceable by suit in equity against the official manager. It is impossible for me to see any distinction between that case and the present.

The

(a) 5 *De G. & Sm.* 686.

The next case is *Lord Talbot's Case* (a), which shews the right of the holder of a policy like the present to come here, and to have the full amount of the fund subscribed by each member of the company.

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 v.
 M'CREIGHT.

It is then unnecessary to refer to the other cases cited, they are sufficient to shew that this demurrer cannot be sustained.

There is, however, this additional circumstance to be adverted to:—under the last act (20 & 21 *Vict. c. 78*) this fetter is put on creditors of a company:—a power is given to appoint a representative of the creditors under the winding-up acts, and who, when he is appointed, represents all the creditors in the winding-up. After this, the creditors cannot institute any proceedings except by leave of the Court (b). That is the only clause which relates to this matter.

This bill, however, alleges, that “the judge charged with such winding-up has not, by advertisement, called upon the creditors of the company to appoint a representative or representatives,” and therefore this clause does not apply.

(a) 5 *De Gex & Sm.* 386. (b) *Sect.* 7.

1858.

March 11, 12.

A. and *B.* carried on partnership : *A.* died, and a considerable sum was due from the partnership to his estate. *B.* continued the trade, with the assent of the executors, but at the end of six months, they insisted on payment, or to have the business wound up, whereupon *B.* assigned to them his share in all the partnership assets, upon trust to pay the joint creditors, and then the debt due to *A.*'s estate, and the residue to *B.* Held, upon *B.*'s subsequent bankruptcy, that the assignment was not an act of bankruptcy. Held also that the executors had no lien on the stock in trade substituted, by *B.*, for that sold during the six months.

PAYNE v. HORNBY.

THE Plaintiffs were the executors of *Bourne*, who died in *November*, 1852.

Bourne, in his lifetime, carried on the business of wholesale grocer at *Wolverhampton*, in co-partnership with *Alderton*, but in *Alderton*'s sole name. The partnership was carried on upon the footing of each partner being entitled to an equal share of the profits, and of the partners being allowed interest on their advances to the partnership.

At the decease of *Bourne*, the partnership was considerably indebted to him. *Alderton* afterwards continued to carry on the business ; he sold part of the stock in trade, he got in part of the assets, he purchased other stock, and he continued to trade with the original and substituted stock.

In *May*, 1853, the Plaintiffs (the executors) and *Alderton* came to an account, when it appeared that 3,329*l.* was due from the partnership to the estate of *Bourne*. The Plaintiffs required payment or to have the affairs of the partnership wound up, whereupon it was agreed, that the partnership should be wound up upon the terms of a deed then executed.

Accordingly, by an indenture dated the 16th of *May*, 1853, and made between *Alderton* of the one part, and the Plaintiffs of the other part, *Alderton* assigned to the Plaintiffs, all that the part, share and interest of him, *Alderton*, of and in "all and singular the land, hereditaments and real estate, stock in trade, money, book

book debts, credits, fixtures and other implements of trade, household furniture, shares in the said *Wolverhampton General Cemetery Company*, policy of assurance and other the property, estate and effects belonging, due or owing to the late co-partnership," upon trust to sell and convert, and, after paying the costs, to pay the debts and demands due from the late co-partnership, except the 3,329*l.*; and in the next place, to retain the sum of 3,329*l.* due to the estate of *Bourne* with interest; and to divide the surplus or residue of the moneys between *Alderton* and the executors of *Bourne*, in equal shares.

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The Plaintiffs, immediately after, took possession of the said stock in trade and effects, and proceeded to realise and convert, they paid all the debts due from the partnership (except that due to the estate of *Bourne*) and they had a balance of 1,104*l.* in hand, applicable to the payment of *Bourne's* debt.

Shortly afterwards, *Alderton* left *England* in difficulties, and on the 31st of *August*, 1853, he was duly found and declared a bankrupt, and the Defendants were appointed assignees of his estate and effects.

The Defendants commenced an action against the Plaintiffs to recover, by virtue of their legal title, as representing the surviving partner of the partnership, the whole amount received by the Plaintiffs in respect of the partnership assets, and they disputed the validity, at law, of the indenture of assignment. The Plaintiffs thereupon filed the present bill, praying a declaration that the Plaintiffs were entitled to apply the balance of 1,104*l.*, and also the proceeds of the other property unsold, in payment of the 3,329*l.* due from the estate of *Alderton* to the estate of *Bourne*, and
to

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 HORNEY.

to go in under the said bankruptcy and prove for the residue against the separate estate of the bankrupt; or otherwise that an account might be taken of the dealings and transactions of the co-partnership, and that it might be declared, that the estate, effects or credits of the said partnership, including any effects or credits which might have been purchased with or have been received in respect of, or have come in the place of any such partnership estate, effects or credits, were, at the time of the execution of the deed and of the bankruptcy, subject to a lien in favour of the estate of *Bourne*, to the extent of what should be due.

The Defendants submitted, by their answer, that the assignment was void under the bankrupt law, and they said, that for the purpose of trying that question, they had brought the action at law for recovering the amount received under it.

Mr. *R. Palmer* and Mr. *De Gex* for the Plaintiffs, argued that the deed in question was no act of bankruptcy, for the joint creditors and the solvent partner, in respect of his lien on the partnership assets, were entitled to be paid before the separate creditors; *West v. Ship* (a); *Ship v. Harwood* (b); and that this deed provided for the several creditors in strict accordance with their rights.

Secondly, that the substituted stock in trade, purchased with the produce of the sale of the partnership stock, was subject to the lien of *Bourne's* estate for the amount due on the partnership account; *Pennell v. Deffell* (c), where the Lord Justice *Turner* says, "It is I apprehend, &c."

Mr.

(a) 1 *Ves. senr.* 239, 455.
 (b) 2 *Swans.* 586.

(c) 4 *De Gex, M. & G.* 388.

Mr. *Follett* and Mr. *Smythe* *contrà*. The assignment by a trader of all his effects is an act of bankruptcy and void against all who do not concur. *Eckhardt v. Wilson* (a); *Siebert v. Spooner* (b); *Ex parte Bailey* (c). The case comes within the principle of these decisions which have decided, that the conveyance of all a trader's property, whether *bonâ fide* for the purpose of regular distribution amongst all his creditors, or by way of security to *bonâ fide* creditors for a valuable consideration, is fraudulent and an act of bankruptcy. It is so if it be for distribution amongst all his creditors; first, because thereby he necessarily deprives himself of the power of carrying on his trade; and secondly, because it is an attempt to make a distribution of his effects different from that which the bankrupt law directs; *Lindon v. Sharp* (d); *Dutton v. Morrison* (e). Here, all the assets passed by the assignment, even those acquired after the death of *Bourne*, and all his creditors ought to have been entitled to come in under it.

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HORNBY.

The next question is, how the accounts are to be taken as regards the creditors subsequent to the decease of *Bourne*? If the Plaintiffs treat the trade as continuing, then it continued with the ordinary consequences, and the subsequent contracts are partnership contracts; but if it be treated as not continuing, the assets which are liable to the joint debts are those only which existed at the death of *Bourne*, and the subsequent assets must be applied in payment of the subsequent debts.

Either the whole are partnership assets and all creditors must then be admitted, or the subsequent acquisitions must be distinguished and handed over to the assignees as separate property.

The

(a) 8 *Term R.* 140.

(b) 1 *Mec. & W.* 714.

(c) 3 *De Gex, M. & G.* 534.

(d) 6 *Man. & Gr.* 895.

(e) 17 *Ves.* 193.

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The validity of the deed is a legal question, and as the Plaintiff at law would have succeeded he ought to have the costs of the proceedings; *Stanger v. Wilkins* (a); *Johnson v. Fesenmeyer* (b); *Holderness v. Shackels* (c). *Colyer on Partnership* (d) and *Story on Partnership* (e) were also cited.

Mr. *R. Palmer*, in reply. The modern decisions shew, that the assignment of the whole of a trader's property, on pressure, is not necessarily an act of bankruptcy, if there be no fraudulent preference or intention to contravene the bankrupt law; *Bell v. Simpson* (f). The cases cited do not apply, the assignment of the joint assets to pay the joint debts could only support a joint bankruptcy; but here, the claim is raised by the separate creditors, or the assignees under a separate commission, who get under the deed all they are entitled to, namely the surplus; *Hankey v. Garratt* (g). As to stopping the business, it was the bounden duty of the executors to do so, and not peril the testator's assets in trade. Secondly, the subsequent creditors have no right as against the joint assets.

[*The MASTER of the ROLLS*.—That is quite clear, the executors did not carry on the trade.]

The Defendants are not entitled to the costs of the proceedings at law.

The MASTER of the ROLLS:

March 12. I have before considered these cases, and must act on the view I at present entertain, which is, that the property

- (a) 19 *Beav.* 626.
 (b) *Ante*, p. 88.
 (c) 8 *Barn. & C.* 612.
 (d) *Page* 77.

- (e) *Chap.* VI.
 (f) 2 *Hur. & N.* 410.
 (g) 3 *Bro. C. C.* 457.

property acquired between the death of the testator and the execution of this deed, by the dealing of Mr. *Alderton*, would not, by itself, in the circumstances of this case, form any part of the property of the original partnership. I do not entertain any doubt as to the validity of the deed; I think it was perfectly valid and effectual, and that the executors would have been at liberty to enter into that deed immediately upon the death of the testator or at any subsequent time. I concur in the argument of Mr. *Palmer* founded on the cases he has referred to, and I think it unnecessary to repeat them from the bench. In fact, the authorities which Mr. *Follett* has referred to do not, in my opinion, touch the present case. He rather put it in the form of a dilemma, that in case I decided the third question against him, then it would necessarily be an act of bankruptcy, because it disposed entirely of all the property belonging to the separate creditors.

Considering, therefore, the deed to be valid, the only real question is, what passed under it. Now I apprehend, that the rights of partners to the partnership assets, upon a dissolution, or upon the decease of a partner, are quite distinct from those of a lien or a mortgage in the ordinary sense of the term. There may be a mortgage or a lien on the stock in trade, but this is a matter which is quite distinct from the rights which a partner has on the ordinary partnership property. Undoubtedly there may be conditions and rules of the partnership, which may give one partner a particular lien on the property, and which would raise a question between him and the joint creditors, as to what was in the order and disposition of the bankrupt at the time of the bankruptcy; but I need not consider that on the present occasion. I take the great distinction to be this: in the case of a lien or a mortgage, the lien remains

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mains on the stock in trade through all its variations and changes; so that if a person in business, who is constantly renewing and changing his stock in trade, gives a mortgage on all his stock in trade, it does not prevent him from selling any portions of it and acquiring fresh, but the mortgage subsists on the constantly changing stock in trade, such as it may be from time to time. But on the death of a partner, I apprehend there arises a right of a totally separate and distinct character; it is, I think, as Lord *Eldon* very accurately expresses it, "*a quasi lien*;" it is, in point of fact, a right to the property in the thing itself; his executors, in respect of his right, are joint tenants with the surviving partners, and accordingly they are entitled to say to the surviving partners, "You cannot sell a single article of the stock in trade without our consent or permission. You can do one of two things; you may either wind up the concern at once, or you may settle what is the value of the testator's property, and pay or secure the payment of that to us, in which case you may go on with the trade."

The surviving partner may, by arrangement, give the executors a mortgage on the partnership stock, in which case they acquire the usual rights of mortgagees to the stock subsequently acquired, but if this be not done, the mere fact, that their testator was a partner at the time of his decease, does not give them that lien.

This is easily exemplified by what is constantly taking place in this Court on a dissolution of partnership, either by death, lunacy, effluxion of time or any other cause. If the executors say to the surviving partner, "we insist upon this being wound up immediately," and the surviving partner hold them at arm's length, refuse to entertain any proposal and goes on with the business,  
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the executors have no remedy but to come to this Court; and in that state of things, this Court appoints a receiver to get in all the partnership property, and the partnership is wound up under the direction of the Court. The Court frequently appoints one of the partners to be the receiver, but it thereby merely makes him an officer of the Court, because he understands the affairs better than any other person. If the executors file a bill for winding up the partnership, but do not apply for a receiver or an injunction, I apprehend that if a variation takes place in the stock and goods while the business is carried on by the surviving partner alone, and fresh goods are brought into the business, and he becomes bankrupt, they belong, in the first place, to the creditors who have been created by the subsequent dealing, and not to the creditors of the old partnership; for it was the duty of the executors, in that case, to come here at once to obtain a receiver and prevent that course of dealing from going on. If it were not so, it would be sanctioning the commission of a fraud against all subsequent and separate creditors, who would be acting under the belief that they were dealing with a person who would be able, from his stock in trade, to pay their debts, but who, in truth, had no stock of his own.

Such being the view I take of the law, the next thing to consider is, what has been done in this case. I must say that the executors appear to me to have behaved as properly as possible. They determined, in the first place, not to exercise the option which was given to them, to carry on the trade; it is clear on the evidence, that the executors never intended to carry on the trade at all. They went to the surviving partner, and informed him that they did not intend to carry on the business. They informed Mr. *Alderton* that the  
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property must be valued, and that he must buy them out, or that the business must be wound up. Accordingly, in the course of two or three days, he made out a statement of account, by which it appears that a sum of 3,482*l.* was due to the testator. If Mr. *Alderton* had paid this to the executors, the matter would have been settled, and he might then have carried on the business as he pleased, and his subsequent trade creditors would have had his stock in trade and his business to look to for payment of their debts. The executors seem to have adopted that statement of account, but were not paid the amount. In about six months, in *May*, 1853, they naturally got uneasy at not being paid, and they insisted on the business being wound up. I treat the business as having been carried on by him on his own sole account, during the whole of that period of six months with the sanction of the executors, who did not interfere, but continued in the expectation that he would pay them, till *May*, 1853, when they insisted on the business being wound up.

The result has been, that the partnership assets have been to some extent dissipated. But I think that they had no lien or mortgage on the stock in trade, in the proper sense of that term; if they had, I concur in the argument of Mr. *Follett*, who asks, "at what period is this lien to stop? Is it to stop at the end of six months, or at the end of six years?" The same principle would apply whether they had insisted on having the business wound up at the end of six months or six years, and had allowed the surviving partner to go on with the business.

Mr. *Alderton* has become bankrupt and gone abroad, and, except the executors, he is the only person who could give any evidence on the subject, and therefore  
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the Court has merely the executors' account of the transaction, which must be taken most strongly against them. In my opinion, the case is shortly this:—after ascertaining what was the amount due to them, and trusting to his promise of payment, they allowed him to go on with the trade as his own: and the promise not being realised, they, six months afterwards, put a stop to the whole business, and cause it to be wound up.

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I have stated the view which I take of this case, but, for the purpose of working it out, I shall take an inquiry in chambers to this effect:—"Inquire whether, under the deed of the 16th of *May*, 1853, the Plaintiffs took possession of any and what goods, stock in trade, credits or effects not belonging to or forming part of the assets of the copartnership, and if any, then take an account of the same and what sum or sums of money have been received by the Plaintiffs in respect thereof, and declare the assignees entitled thereto."

Direct a general account of the Plaintiffs' receipts and payments under the deed.

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## GREAVES v. WILSON.

Conditions of sale must be construed strictly against the person who frames them.

A condition, that the vendor shall be at liberty to rescind the contract, if the purchaser should "shew any objection of title, conveyance or otherwise, and should insist thereon:" was held, not to authorize the vendor to rescind the contract, without attempting to answer the requisitions, although some of them were untenable; held also, that he was bound to answer them, and give the purchaser an opportunity of either waiving or insisting upon them.

The vendor, notwithstanding such a condition, was held bound to comply with a requisition, that a mortgagee of the property, by underlease, should be paid off and concur in the conveyance.

A vendor has duties, in that character, which he cannot get rid of by such conditions of sale.

THE Defendant *Wilson*, being possessed of a public-house, &c. called *The John Bull*, for an unexpired term of forty-six years, put them up to sale by auction on the 20th of *July*, 1857, subject to certain particulars and conditions of sale, the material ones of which were as follows:—

"4. That the vendor shall deliver an abstract of his title to the purchaser, or to his or her solicitor, commencing with the underlease by which the vendor holds, and the purchaser shall not require the production of, or inquire into or take any objection to the title to the premises prior to such underlease, and the production of the last receipt for rent paid shall be accepted, by the purchaser, as conclusive evidence of the satisfactory performance of all the lessee's covenants in the underlease, up to the time of completing the purchase.

"5. That within five days from the delivery of the abstract, all objections, queries and requisitions on the title shall be delivered, in writing, at the office of the vendor's solicitors, and all objections, queries and requisitions (if any) not so delivered shall be considered as waived, and, in this respect, time shall be considered as of the essence of the contract. And if the purchaser shall, within the time above limited, shew any objection, whether of title, conveyance or otherwise, and shall insist thereon,

*thereon, the vendor shall be at liberty to rescind the contract and annul the sale, if he shall think fit so to do, on returning the deposit, without interest or costs, in satisfaction of all claims of the purchaser, notwithstanding any negotiation which may have been carried on relative to such objections, queries and requisitions."*

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The Plaintiff became the purchaser for 1,410*l*.

The abstract was delivered, and, within five days, the Plaintiff's solicitor delivered certain queries and requisitions concerning the premises. Amongst other things, he required the vendor to shew that the covenant in the lease to insure had been kept, by obtaining the approval of the superior landlord of the amount for which the premises were insured and of the office in which such insurance was made. A claim was also made for compensation, and some proof of the proper grant of certain letters of administration, which formed a link in the title, was required.

The chief requisition however was, that, as it appeared that Messrs. *Calvert* had a mortgage on the premises, in respect of which they claimed 1,595*l*., the purchaser required such mortgagees to concur in the sale.

The Defendant never attempted to answer any of the queries or requisitions, but, on the 10th day of *August*, 1857, his solicitors wrote and sent to the Plaintiff's solicitors a letter, which was as follows :—" We have received your objections, queries and requisitions on the title, which are of such a kind, that the vendor thinks fit to rescind the contract and annul the sale, and the contract is accordingly hereby rescinded, and the sale is hereby annulled. We enclose an order to the auctioneer to return the deposit."

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The Plaintiff declined to accede to this, and he filed a bill for specific performance, stating that he had discovered, since the requisitions and queries had been delivered, and the facts were, that, in truth, the queries and requisitions did not raise any objection of title, conveyance or otherwise, or none which the *Defendant could not remove if he wished to do so*, and that the sole reason of the Defendant's desiring to rescind the said contract was, that he thought he might obtain a higher price for the premises, if he attempted to resell them. The bill then stated as follows :—"The Plaintiff hereby offers to waive any objection raised by the said queries and requisitions, if there be any which the Defendant is really unable to remove."

The cause now came on for hearing.

Mr. Kay (Mr. *Roundell Palmer* with him), for the Plaintiff, waived all the objections, except that as to the mortgage, and argued, that by the terms of the conditions of sale, the vendor was bound to give the best answer he could to the requisitions, in order that the purchaser might have the opportunity, in case any of them raised an insuperable objection, of choosing whether he would "insist thereon" or abandon it. That in truth, the requisitions, to which answers were required, did not raise any objection which the vendor could not remove; and that such objections only, as the vendor was absolutely unable to remove, were within the meaning of such a condition, and conditions of this kind were always construed against the vendor; *Painter v. Newby* (a); *Hoy v. Smythis* (b).

Mr. *Lloyd* and Mr. *Smythe* for the Defendant, argued,  
 that

(a) 11 *Hare*, 26.

(b) 22 *Beav.* 510.

that some of the requisitions raised questions which were prohibited by the conditions of sale, and that this authorized the vendor to exercise his option to rescind, without answering them. They cited *Page v. Adam* (a); *Hyde v. Dallaway* (b); *Norley v. Cook* (c).

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I think the Plaintiff is entitled to a decree for specific performance. The mode in which these conditions must be construed is explained, very clearly, in all the cases upon the subject, and nowhere more clearly than by Sir *James Wigram* in *Money v. Cooke* (c). They must be construed, like every other instrument, most strictly against the person who frames them, because the vendor alone can be the sole judge of the necessity or propriety of making such conditions before he offers the property for sale. In addition to that, it is to be borne in mind, that a person who offers property for sale becomes subject to certain duties, in the character of vendor, and that he does not get rid of them by special conditions of sale. For instance, he cannot, by entering into any condition of sale of this description, compel a purchaser to take a title upon an insufficient abstract, if he is able to give him a complete one. He is bound to perform the duties of a vendor as fully as he is able to do, subject to this exception, that it shall be reasonable, for it is always a question of the reasonableness of the thing required, for although it may be in his power to do it, it may involve him in so much expense and trouble as to make it unreasonable that he should be called upon to do it. This exception or condition of sale

(a) 4 *Beav.* 269.

(b) 4 *Beav.* 606.

(c) 2 *Hare*, 106.

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sale is introduced with a view of meeting that particular sort of case. *Page v. Adams* (a) establishes this: that a vendor cannot make use of a condition to rescind a contract, for the purpose of getting rid of the duty which attaches to him, upon the rest of the contract, of making out the title. These conditions then are to be construed most strictly against the vendor, and assuming that a particular portion of the requisitions of title made by the purchaser was not tenable, namely, that which required the vendor to shew, that the superior landlord and lessee approved of the amount for which the property was insured and the office in which the insurance was effected, which I think was covered by the condition that the last receipt for rent paid should be proof that the covenants had been duly performed, and assuming also that the requisitions asking compensation and requiring it to be proved that the letters of administration had been properly granted by the Ecclesiastical Court, were not tenable, still I think these requisitions did not justify the vendor in saying "I will put an end to the contract at once without making any observation upon the subject."

The requisitions were delivered within the five days specified by the fifth condition, which proceeds in these terms:—"And if the purchaser shall, within the time above limited, shew any objection, whether of title, conveyance or otherwise, and shall insist thereon, the vendor shall be at liberty to rescind the contract and annul the sale." Does that mean, that if a requisition be put to the vendor which he disapproves of or dislikes, he is thereupon to be at liberty to say at once, "I will put an end to the contract?" It is clear he would not be, in some case; for suppose there had been a simple requisition

(a) 4 Beav. 269.

tion that the mortgagees, Messrs. *Calvert*, should join in the conveyance to the Plaintiff, could it be argued that the vendor would be at liberty to put an end to the contract. It was necessarily incidental to the contract and to the very thing sold, that it should be assigned to the purchaser discharged from all incumbrances, and therefore, that the vendor should procure the incumbrancers to join in the conveyance.

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In addition to this, it is to be observed, that the condition is not only, if the purchaser "shall shew any objection," but also if he "shall insist thereon." I am of opinion that this insistence upon an objection is a separate and distinct thing from taking it, and that it required the vendor's solicitor to say, "With respect to some of these requisitions they are untenable, and with respect to others, we cannot comply with them, and with respect to the one requiring the concurrence of the mortgagees, we will obtain it." If after making such a statement, the purchaser had said "I insist upon having these requisitions complied with," then the vendor might well have said, "I do not wish to have a chancery suit for the purpose of determining that question, and under the conditions of sale I will put an end to the contract." But even in that case there must have been a certain degree of reasonableness, because if the sole requisition had been that the mortgagee should join in the conveyance, it would not have entitled the vendor to put an end to the contract:

That being the case, the Plaintiff was not, in my opinion, entitled to give notice to rescind the contract at the time when he did, without saying more as to the title or requisitions. He never retracted, in the slightest degree, or said, "if you waive this or that I will not insist on putting this condition of sale into operation."

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A considerable light is thrown upon this matter by the circumstance, that this was a very unfortunate sale, the property having been sold for much less than it was worth, and as it appears much less than the reserved price. That circumstance, however, in my opinion, tells against the vendor, and is no reason for avoiding the contract. If the vendor intended to make use of this condition for the purpose of avoiding the sale, in case the property should not be sold for what he considered its full value, then it was clearly fraudulent and intended to deceive a purchaser, who would be wholly unable to ascertain what use the vendor intended to make of it. I think that it could not be allowed to be made use of for this purpose. The vendor ought, if he so intended, to have expressed it plainly in his conditions of sale by saying, "if the property does not sell for as much as I think it is worth, I reserve to myself a right to put an end to the contract," and then there would have been no purchaser.

In this state of circumstances, the Plaintiff, in my opinion, is entitled to a decree for specific performance, but the only point upon which I should wish to hear a reply is, with respect to the costs of the suit up to the hearing, because I do not find that prior to the filing of the bill there was any waiver or abandonment of the requisitions made. The last clause in the bill is hardly sufficient for that purpose, it is an offer to waive any objection "which the Defendant is really unable to remove." Now, he may be able to remove the objections, but at a very great amount of expense and trouble. He may be able to shew, that the ground landlord and first lessee approved both of the value and of the office in which the insurance was effected. He may also be able to prove, that the letters of administration were properly granted by the Ecclesiastical Court, but in my opinion  
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the purchaser was not entitled to ask that question. If the waiver does not extend to that, and I must, as a point of pleading, take it most strongly against the Plaintiff, it would be difficult, although at the bar all objections, except the concurrence of the mortgagees, were waived, to say, upon that statement in the bill, that I can do more than make a decree for specific performance.

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Mr. *Kay* in reply, upon the question of costs, urged, that the circumstance that requisitions had been made which could not be insisted on, was no ground for departing from the rule, that costs should follow the result of the suit. The vendor or his solicitor, as the argument of the Defendant's counsel had shewn, could have answered all the requisitions in half an hour, on a sheet of note paper, and those which were prohibited by any condition of sale might have been answered by a simple reference to such condition. That the suit had not been occasioned nor had any costs been incurred by the requisitions, not even by those which might be untenable. That it was the custom to make a number of requisitions on the points of doubt, notwithstanding the existence of a condition which might prevent the purchaser from insisting on them, because it might happen that the vendor would be able and willing to give satisfactory answers.

As to the value of the property, the best proof of its value was, that the sale was by public auction and that the purchaser was the highest bidder, and the circumstance, that the Defendant thought he could get more on a resale, was no excuse for this attempt to break his contract.

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I will consider and dispose of the costs to-morrow morning. In the meantime, the decree will be in other respects in these terms:—The Plaintiff waiving all objections to the title.

[Mr. Kay. Except the concurrence of the mortgagees.]

*The MASTER of the ROLLS.*

No; that is not a question of title, but of conveyance. The Plaintiff is entitled to a proper conveyance; and the decree then will be, the Plaintiff, waiving all objections other than the concurrence of the mortgagees, decree a specific performance of the contract, and direct the Defendant to execute a proper assignment of the lease by all proper parties, to be settled in chambers in case the parties differ.

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March 17.

*The MASTER of the ROLLS* said, that he thought that the Plaintiff was entitled to the costs of the suit.

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BIRLEY v. BIRLEY.

ON the marriage of Mr. and Mrs. *Birley*, a sum of 2,000*l.*, then advanced by Mrs. *Birley's* father, was settled by an indenture of the 13th of *January*, 1800, upon the following trusts:—

Upon trust for Mr. and Mrs. *Birley* successively, for their lives, and from and after the decease of the survivor of them, upon trust for all and every, or such one or more of the children of the marriage, in such parts, shares and proportions, manner and form, as Mr. and Mrs. *Birley* should jointly appoint, and in default as the survivor of them should, by deed, with or without power of revocation, or will, appoint. And in default, in trust for all such children as should be living at the decease of the survivor of them, and the issue of such as should be then dead leaving issue, share and share alike, the issue of a deceased child taking their parents' shares.

Mrs. *Birley's* father afterwards, by his will, added a sum of 16,856*l.* to the settlement, which was to be held subject to the same trusts.

Mr. *Birley* died in 1833, without having concurred in any joint appointment. There were ten children of the marriage, viz.:—*Hornby, John, George, Richard, Elizabeth, Fanny, Alice, William*, and two others, *Daniel and Margaret*.

March 12, 17.

Observations on the decision in *Tucker v. Sanger, M'Clel.* 424.

An absolute appointment was made to an object of a power, under a prior "understanding" between the appointor and appointee, to hold in "trust" for persons, some of whom were objects and some not. Held, that the whole was void.

A parent had a power to appoint to children alone. She appointed to two children absolutely.

The next year, the appointees settled the property on children and grandchildren of the parent, by a deed reciting, that when the appointment was made, it was understood, between the ap-

pointor and appointees, that the latter should consider themselves as possessed of the property upon the trusts of the settlement. Held, that the transaction was a fraud on the power and wholly void.





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By deed poll, dated the 12th of *May*, 1847, Mrs. *Birley* irrevocably appointed, that after her decease, the trustees should stand possessed of the fund left by her father's will in trust to pay thereout, as soon as conveniently might be after her decease, the sum of 100*l.* to each of her three sons, *Hornby*, *John* and *George*, or to the issue of any such son, in case any of such sons should die before the same should become payable; the further sum of 100*l.* unto the children of her said late son *Richard* who should be living at the time of her decease; the further sum of 100*l.* unto the children of her said late daughter *Elizabeth* who should be living at the time of her decease; and the further sum of 100*l.* to her daughter *Fanny*. And as to all the residue to which *Margaret Birley* might be entitled of the said residuary estate under the said will, she directed that her trustees should divide the same equally between her son *William Birley* and her said daughter *Alice Buck*, and their respective executors, administrators and assigns, as their own proper goods and chattels for ever.

By a deed poll dated the 24th day of *April*, 1848, under the hands and seals of *William Birley* and *Alice Buck*, after reciting the said last-mentioned deed of appointment, and reciting, that at the time the appointment was made by *Margaret Birley*, *it was understood between her and William Birley and Alice Buck, that they should, in fact, consider themselves as possessed of the said residue so appointed to them, after deducting from the respective shares thereof the several sums so absolutely appointed as aforesaid, upon the trusts in the now stating deed declared concerning the same: in pursuance of such understanding, and in order to carry the same into full effect, William Birley and Alice Buck thereby declared, that the residue was so appointed to them, and that they and the survivor of them, and the*  
executors

executors and administrators of such survivor, should hold the same, as to one-eighth for *Hornby* for life, with remainder to his children; as to another one-eighth for *John* for life, with remainder to his children; as to another one-eighth to *George* for life, with remainder to his children; as to another one-eighth to the children of *Richard* (deceased); as to another one-eighth to the children of *Elizabeth*; as to another one-eighth to *Fanny* for life, with remainder to her children; as to the one remaining eighth to *Alice* absolutely, if living at her mother's death, but if then deceased, to be paid to her children; and as to the remaining one-eighth, to pay it to *William* absolutely, if living at his mother's death, and if dead, to pay it to his widow for life, with remainder to his children.

Mrs. *Birley* afterwards executed another appointment, dated the 16th of *June*, 1849, whereby, without noticing the former appointment, she appointed that the trustees should hold the fund in trust to pay 100*l.* each to five of her children, and transfer the residue of the fund upon such trusts, &c. as *William Birley* should, by any deed, &c., with or without power of revocation, or by his will, appoint, and in default, to the sole use of *William Birley* absolutely.

*William Birley* afterwards made appointments of the fund by deeds dated respectively the 30th of *July*, 1849, the 29th of *June*, 1850, which were revocable, and ultimately by a deed of the 14th of *November*, 1853, which was irrevocable, whereby he appointed the fund in sixths, between himself and three surviving children and the children of two deceased children.

Mrs. *Birley* died in 1856, and this suit was instituted by the trustees to have the rights of the parties to the 16,856*l.* declared by the Court.

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Mr. *Kay* for the Plaintiffs, the trustees, insisted on the validity of the appointment of 1847, and the subsequent settlement of 1848. He principally relied on the case of *Tucker v. Sanger* (a), in which the testator devised (b) an estate to his daughter, *Mary Tucker*, for life, with remainder to such of her children as *John Sanger* should appoint, and in default to them equally. *Mary Tucker* died in 1820, leaving four children, and by a deed dated the 10th of *December*, 1821, *John Sanger* appointed the whole estate to *Edward Tucker*, one of the four children, in fee (c). The other children insisted that the appointment had been made out of resentment and from improper and corrupt considerations (d). This the appointor denied, but by a deed of the same date, 10th *December*, 1821 (e), to which the appointor and appointee were parties, after reciting "an arrangement between the two first parties, that the messuages, &c. thereafter expressed to be released should be settled to the uses thereafter declared, the estate was conveyed to the use of *Edward Tucker* for life, and after his decease to his children equally. It was argued, in support of the appointment, "that a power might be extended in favour of persons not objects of it, with the approbation of any one individual to whom the whole estate might be appointed (f). On the other hand, it was urged (g), "that the appointee having, after the appointment was executed, in pursuance of a previous agreement, settled the estate on himself for life, with remainder to his children, who were not objects of the power, that settlement was a fraud upon the power and avoided the appointment, so made in execution of it, altogether." But Chief Baron *Alexander* was of a different opinion, on the authority of

(a) *M'Clel.* 424, 439, and 13 *Price*, 607.

(b) *M'Cleland*, 426.

(c) *Id.* 429.

(d) *M'Cleland*, 431.

(e) *Id.* 436.

(f) *Id.* 443.

(g) 13 *Price*, 626.

of three cases cited, viz., *Langston v. Blackmore* (a), *Routledge v. Dorriell* (b), and *White v. St. Barbe* (c), which the Chief Baron stated "were cases, too, of contracts made previously to the execution of the power" (d), and he said, "I entertain no doubt whatever but that this is a good execution of the power." On a subsequent occasion, *Cutten v. Sanger* (e), the Chief Baron observed, "that he had reconsidered the principles on which he had proceeded in that case, and that he saw no reason to depart from them." Lord *St. Leonards* refers to the case of *Tucker v. Sanger* without disapproval (f).

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Mr. *R. Palmer* and Mr. *C. Swanston* for the Defendants, insisted that the appointment of 1847 and the declaration of trust of 1848 were, as regarded the residue, completely invalid; and that it was now held subject to the appointment of 1849, and the subsequent deed of 1853.

That here, the appointor had expressly stipulated for a benefit in favour of persons not objects of the power; that this created a trust for them, and, upon every principle, was a fraud on the power and invalid; *Daubeny v. Cockburn* (g); *Agassiz v. Squire* (h); *Lee v. Fernie* (i); *Salmon v. Gibbs* (k).

That in *Tucker v. Sanger*, Chief Baron *Alexander* was satisfied, that, in substance, there was an absolute appointment to *Edward*, which gave him the power of accomplishing his object of settling the property on his children; but here the recital, that there was an "understanding" that *William* and *Alice* were to be trustees, which

(a) *Amb.* 289.(b) 2 *Ves. jun.* 357.(c) 1 *Ves. & B.* 399.(d) *McClell.* 451.(e) 2 *Younge & J.* 466.(f) 2 *Sug. Pow.* 282 (6th ed.).(g) 1 *Merivale*, 626.(h) 18 *Beav.* 431.(i) 1 *Beav.* 483.(k) 3 *De Gex & Sm.* 343.

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which was a binding trust; *Podmore v. Gunning* (a); and that if they took on trust, they could, under no circumstances, claim the property beneficially; *Briggs v. Penny* (b).

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

17 March. The question to be determined, in this case, is, who are the persons interested under the appointments made in pursuance of the power contained in a settlement made on the marriage of *John Birley* and *Margaret Backhouse* on the 15th of *January*, 1800.

Mr. and Mrs. *Birley* had a joint power of appointing the property amongst their children, and in default, a similar power was given to the survivor of them. No joint appointment was made, and the husband died previous to the year 1847. Afterwards, an appointment was made by Mrs. *Birley*, by a deed dated the 12th of *May*, 1847, by which she appointed 100*l.* each to her sons *Hornby*, *John* and *George*, and 100*l.* to *Fanny*. These are admitted to be good executions of the power *pro tanto*. Besides this, she appointed two other sums of 100*l.* each to the children of *Richard* and of *Elizabeth*, both deceased. Her grandchildren were not objects of the power, and it is not contended that the exercise of her power, so far as these two sums is concerned, is good or can take effect.

The question which has been argued arises on the appointment of the residue, which is given to *William Birley* and *Alice Buck* absolutely. They were objects
of

(a) 7 *Simons*, 644.

(b) 3 *De Gex & Sm.* 525; 3 *Mac. & G.* 546.

of the power, and if *Margaret Birley* intended to make the appointment for their individual benefit, it is a perfectly good exercise of the power, and *William Birley* and *Alice Buck* could do as they pleased with it.

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But by a deed poll of the 24th day of *April*, 1848, they have appointed the residue, in eighths, in favour of persons, some of whom are not objects of the power, and the first question is, if this is good.

This appointment by deed poll, under the circumstances of this case, cannot be partially good, that is, good so far as it is in favour of persons objects of the power, and bad so far as it is in favour of persons not objects of the power. It is, in my opinion, wholly good or wholly bad; and this depends upon the validity of the deed of *May*, 1847. The deed poll is good, provided the appointment of the residue by the deed of 1847 to *William* and *Alice* is good; and this appointment of the residue to them is undoubtedly good, provided it was intended to give them a beneficial interest in the residue so appointed to them. It is clear however that this was not the case: on the contrary, the evidence shews, that the appointment was made to them, for the purpose of making the distribution which was afterwards made by them by the deed poll of *April*, 1848. This appears from the deeds themselves, which were handed up to me in Court, but of which I have not since been furnished with a copy. The deed poll of *April*, 1848, expressly recites that such was the object of the deed of 1847, and that they *William Birley* and *Alice Buck* did not take beneficially under it, but in a fiduciary character. This is also stated in the sixteenth paragraph of the bill.

I should

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I should have felt no doubt, in the absence of authority, that this was void as a fraud upon the power. It is plain that if it were not void, any donee, of a power to appoint in favour of specified objects, might, by indirect means and by arrangement with one of the objects of the power, appoint the fund, or the greater part of it, in favour of strangers and persons not objects of the power. That such an appointment is void on principle is shewn by an abundance of authorities.

But, on the other hand, it is said that this case is governed by an authority to be found in *M^c Cleland* and also in *Price*, the former under the title of *Tucker v. Sanger (a)*, and the latter under the title of *Tucker v. Tucker (b)*. The case was to this effect, as stated in the marginal note :—"A power of appointment, given by will to the donee, to appoint, after the death of a devisee for life, to the use of such of her child or children, and for such estate or estates, and in such shares and proportions, manner and form, as the donee, by deed or will, shall limit and appoint, or give and devise the same, and in default of appointment to the children of the devisee, equally between them, is well executed by an exclusive appointment (by deed) to one of the objects of the power in fee, and that appointment is not avoided by a deed of settlement, made almost immediately after by the appointee (in consequence of a previous agreement between him and the appointor) conveying the property to trustees to the use of himself for life, with remainder to his children (not objects of the power) in fee, with an ultimate remainder to himself in fee."

Lord *St. Leonards*, in his work on Powers, states the point thus :—"An appointment first to the child and then a settlement by the child, in consequence of an agreement

(a) *M^c Clel.* 424.

(b) 13 *Price*, 607.

agreement with the father before the appointment, upon himself (the child) and his children (not objects of the power), with provisions, by way of annuity, for other objects of the power, have been held valid. There was a provision also for costs. It was insisted that the settlement was a fraud upon the power. But *Alexander, C. B.*, held otherwise." It is quite clear from the manner this decision is there spoken of, that Lord *St. Leonards* did not altogether approve of it, because he speaks of the earlier cases and states that there was much greater difficulty in *Tucker v. Sanger (a)*, where persons were made objects of the power in pursuance of a contract with the donee of the power.

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It is obvious that the case must have created considerable difference of opinion, for we find the Lord Chief Baron afterwards insisting (*b*) on the correctness of the decision, which he would not have done, unless it had been questioned. Lord *St. Leonards* considered the case as one of great difficulty, having regard to the earlier cases. Looking at the cases which Chief Baron *Alexander* considered as stronger than and fully warranting his decision, viz. *Routledge v. Dorril* and that class, they simply lay down the proposition, that when the donee of a power intends to appoint and the appointee intends to settle the property, the whole may be effected by one deed or one instrument, and the appointment and settlement may be made simultaneously; but if the reason of the appointment being made to the appointee arises from a previous contract with the donee of the power to appoint to persons not objects of the power, I find no previous case which amounts to a decision that such an appointment can be supported in this Court.

I think

(a) 2 *Sug. Pow.* 282.(b) 2 *Y. & Jer.* 459.

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I think it clear, that the Chief Baron considered that the evidence, in that case, did not shew that the appointee took the property otherwise than for his own absolute use and benefit, and that he might have refused to make the settlement in question, if he thought fit, and yet have kept the property for his own benefit under the appointment. When such is the case, the question does not arise, the appointee can of course deal with the property, which is his own, as he thinks fit; if he settle it on strangers, it is no longer in order to complete the exercise of the power of appointment by the appointee for the donee, but it is a distribution of his own property by a person who takes it absolutely, and it is indifferent, as he takes as a purchaser, whether he takes under the exercise of a power or not. I do not therefore consider the case of *Tucker v. Sanger* as altering the law on this subject, it is a mere question of evidence. But if it is contended that that case establishes the proposition, that no bargain between the appointee and the donee of a power, by which the appointee gets the absolute appointment by agreement with the appointor, for the purpose of providing for persons not objects of the power, and to whom the donee could not have given it directly, is invalid, provided no direct pecuniary benefit arises to the donee, then I dissent from this view of the law: but I do not understand that any such proposition is intended to be established by the Lord Chief Baron in that case.

The question in all these cases is this: in what character did the appointee take the property? if he took absolutely, he might do with it as he pleased: but if in trust for the donee of the power and to effect that which it was not within the authority of the donee to effect under the terms of the power, then it is illegal and amounts to nothing.

What

What was the case here? The terms of the deed of the 24th of *April*, 1848, shew this beyond the possibility of question or doubt, it is stated in the recital in the deed poll of the 24th of *April*, 1848, in par. 16 of bill (a). Suppose, after executing a deed with such recitals in it, and after making such admissions, *William Birley* and *Alice Buck* had sought to retain the property for their own use, could I have allowed persons who accepted property in a fiduciary character to keep it for themselves? All principle and authority is the other way. Who then were to take it? The answer is, the persons not objects of the power. To let them take would be to alter the execution of the power altogether.

I am of opinion, therefore, that *William Birley* and *Alice Buck* did not take beneficially as owners of the property under the appointment, but that they were intended to take as trustees for the purpose of effecting the wishes and objects of *Margaret Birley*, which the law does not permit.

The consequence is, that the appointment to them by the deed of *May*, 1847, is void, and as they took nothing under it, the deed poll of the 24th of *April*, 1848, is also void.

Then comes the deed poll of appointment by *Margaret Birley* of the 16th day of *June*, 1849, by which, disregarding the former appointment of the residue, and treating it, as I think properly, so far as the residue is considered, as wholly void, she appoints the whole residue to *William Birley* absolutely. No evidence is submitted to me to shew that this was the result of any bargain, either proper or improper, between the donee and

(a) *Ante*, p. 300.

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and appointee. In the absence of evidence, it must be assumed to be valid, and under it, therefore, *William Birley* took the whole residue, subject to the prior specified appointment in favour of objects of the powers.

I pass over the deeds executed by him containing a power of revocation, which was exercised by him and revoked accordingly, and come to the deed of the 14th of *November*, 1853, executed by him, dividing the property in question into six-sixths, which is a perfectly good and valid deed, for by it *William Birley* merely disposes of his own property. This is confirmed by the deed of the 7th of *November*, 1856, which still further establishes the division to be made; and which regulates the distribution of the property, subject always to the four sums of 100*l.* each, given by the deed of appointment of the 12th day of *May*, 1847, to which I have already referred and which are perfectly good.

GEDYE v. MATSON.

22 March.

A surety for a mortgagor, who pays part of the mortgage, is entitled, as against the mortgagor, to a charge on the estate.

A surety who covenants for payment of the mortgage money is not a necessary party to a foreclosure suit, if he has paid nothing.

IN 1825, *John Matson*, the elder, mortgaged a leasehold property for 1,400*l.* His son, *John Matson*, the younger, joined in the mortgage as surety for his father, by covenanting to pay the mortgage money.

John Matson, the elder, died in 1826, and in 1848, *John Matson*, the younger, paid off 250*l.*, part of the 1,400*l.*

This bill was filed by the mortgagee, against the representatives of *John Matson*, the elder, and against *John*

John Matson, the younger, praying a foreclosure as against both Defendants.

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The cause now came on for hearing.

Mr. *J. H. Palmer* for the Plaintiff asked for the usual decree for foreclosure.

Mr. *Welford* for the administrator of *John Matson*, the elder.

Mr. *Nalder* for *John Matson*, the younger, objected that a mere surety by covenant was not a proper party to a bill to foreclose (a).

[*The MASTER of the ROLLS*.—I think so too, if he has paid nothing, but here the surety has paid off part of the mortgage; he is entitled to stand in the place of the mortgagee, and is, therefore, interested in the equity of redemption. If the Plaintiff were to foreclose the representatives of the mortgagor alone, he would not obtain a good title, for the surety might afterwards come and redeem.]

The mortgage having, *pro tanto*, been paid, the debt is discharged, *Copis v. Middleton* (b), and cannot be set up by the surety. Besides this, the property is not worth the 1,150*l.* which is due, and this Defendant insists that he ought not to have been made a party; he is ready to disclaim, but ought to have his costs (c).

The MASTER of the ROLLS.

If I entertained any doubt I would allow further time

(a) See *Newton v. The Earl of Egmont*, 4 *Simons*, 574.

(b) *Turner & Russ*, 224.

(c) *Stokes v. Clendon*, 3 *Swan*, 150.

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time to look into the authorities, but I think the doctrine of principal and surety so well established that I entertain no doubt.

It is quite settled, that if a man makes a mortgage and induces a third person to become his surety and to covenant to pay the debt, the surety is entitled to stand in the place of the creditor, and to have the benefit of all the remedies and advantages which the creditor had against the principal debtor.

No interest which the surety can acquire can have priority over the creditor, but to the extent to which the surety has paid off the debt, he has a right to the benefit of the remedies of the mortgagee. Thus, if a man mortgage his estate for 1,000*l.* to *A.*, and gets *B.* to become his surety, and *B.* pays off 500*l.* of the debt, *B.* may, as against the original debtor, enforce payment of his debt, provided *A.* be fully paid. *B.* would be in the situation of a subsequent incumbrancer, and as if the mortgagor had executed a second mortgage to him. As against the principal debtor, the surety is entitled to a charge on the estate.

John Matson, the younger, disclaiming at the bar, a decree absolute may, by consent, be taken against the other Defendant.

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Re THE ST. GILES AND ST. GEORGE
BLOOMSBURY VOLUNTEER CORPS.

25 March.

DURING the war which ended in 1815, a volunteer corps was established in the above parishes, and a fund was subscribed for the purposes of the association. At the peace in 1815, the corps was disembodied, and there remained a fund in hand. In 1824, it was resolved, that it should be reserved, as a fund to assist in fitting out a similar force, if required, and in the meantime, that the income should be applied for the benefit of the members of the regiment, if living, and of their families if dead, "who might stand in need of pecuniary aid and assistance."

The sanction of the Charity Commissioners is not necessary to enable a trustee of a charity fund to pay it into Court, under the Trustee Relief Act, and when paid in, this Court may proceed to deal with it and direct a scheme, without the certificate of the commissioners.

The surviving trustee of the fund died in 1851, and in 1857, his executors paid the fund, consisting of 2,305*l.* Stock, and 434*l.* cash into Court under the Trustee Relief Act.

The petition was presented by the Rectors of the two parishes, who were *ex officio* vestrymen, praying that the persons entitled to the trust funds might be ascertained, and that a scheme might be directed. The only question was, whether the certificate of the Charity Commissioners was necessary, in order to enable the Court to make the order.

Mr. *G. L. Russell*, in support of the petition, argued, first, that under the Trustee Relief Act, 10 & 11 *Vict.* c. 96, a trustee was, in all cases, entitled, of his own authority, to pay a trust fund into Court. And 2ndly, that

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that the fund being paid in, the Lords Justices had held, in the case of *In re Lister's Hospital* (a), that this Court could deal with it, without the certificate of the Charity Commissioners under the 16 & 17 Vict. c. 137, sect. 17. He referred to *In re Markwell's Legacy* (b); *In re London, Brighton, &c. Railway* (c); *In re Cheshunt College* (d); *In re Skeetes* (e).

Mr. Wickens, *contra*, for the Crown, argued, that this petition could not proceed without the certificate of the Charity Commissioners, for otherwise the provision of the statute, forbidding the Court of Chancery to entertain any "suit, petition or other proceeding" without such certificate, with the exception only of cases, "not being an application in any suit or matter actually pending," would be evaded.

That either the payment of the fund into Court, or the petition for its application, originated the pendency of the "suit or matter," and that, therefore, either the one or the other proceeding was irregular, if taken without the sanction of the Charity Commissioners. He observed, that the case of *In re Lister's Hospital* had been decided without argument and in the absence of the *Attorney-General*, and that it did not strictly apply to this case, which went beyond it; for the whole proceeding originated in the act of the trustee, and besides, a scheme was here asked for the future distribution of the charity property, which was a case to which the act was especially intended to apply (f).

*The*

(a) 6 De G., M. & G. 184.

(b) 17 Beav. 618.

(c) 18 Beav. 608.

(d) 1 Jur. (N. S.) 995.

(e) *Ibid.* 1037.

(f) 6 De G., M. & G. 184.

*The MASTER of the ROLLS.*

I cannot reconcile the two cases. I am satisfied that the principle of *Lister's Hospital Case* overrules my decision in the case of *Markwell's Legacy*, and I am bound to follow the former. It is impossible to say, that the trustees were not at liberty to pay this money into Court. If the legislature intended to restrict the Trustee Relief Act by the subsequent Act, which directs that no proceeding shall be taken with reference to a charity, except with the assent of the Charity Commissioners, it ought to have stated, that the Act should extend to moneys paid into Court by charity trustees, for it is a recognized and well founded principle, that one act does not repeal the powers contained in another, unless by express reference to the Act which it is intended to repeal. It is true that occasionally the second Act may be inconsistent, but unless that be so, it cannot be held to repeal the prior Act.

Where a railway company takes charity lands, under its compulsory powers, its right to pay the purchase-money into Court is, in no way, fettered by the act appointing Charity Commissioners. Upon taking the land, the company become trustees of the purchase-money for the charity, and merely transfer it into Court in order that the Court may deal with it as it may think right.

In the same way, individuals holding money for charitable purposes may pay charity funds into Court, for it can make no difference whether they be held in trust by a corporation or by private individuals. If it can be done, without the authority of the commissioners in one case, it can be done equally in the

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the other. Accordingly, the Court has repeatedly dealt with property in the hands of trustees, without the certificate of the commissioners, as where it has been doubtful whether the devotion of it to charity was or was not valid under the Statute of Mortmain, or whether the charitable purposes intended could or could not be carried into effect. In such cases, the Court has frequently adjudicated upon the rights of the parties interested in the matter, without the certificate of the Charity Commissioners.

I, therefore, hold it to be clear, that the Charity Act is, in no degree, a fetter upon the powers of trustees to pay trust money into Court.

That being so, *Lister's Case*(a) determined, that when money had been paid in under an Act, this Court had full authority to deal with it as it might think right. If that were not so, this difficulty might arise (although it is very unlikely):—The Charity Commissioners might be of opinion that it would be better to do nothing at all respecting the fund in Court, and if so, they would have the power of preventing the Court exercising its functions and powers with respect to the fund in Court, which could, in no respect, be permitted.

In a former case (b), I thought, that such a case was not a matter actually pending at the passing of the act, but the Lord Chancellor and the Lords Justices have come to an opposite conclusion, and I am of opinion that their decision is a much more convenient one, and that it binds me upon the present occasion. I think, therefore, that it makes no difference

(a) 6 *De G., M. & G.* 184.

(b) 17 *Beav.* 618.

ence that the payment of the money, in this case, was made under the Trustee Relief Act, and that I can now deal with it without the sanction of the Charity Commissioners. I will therefore make the order as prayed.

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Re PEYTON'S SETTLEMENT,
In re THE TRUSTEE ACT, 1850.

BY the settlement made on the marriage of Mr. *Peyton* with Miss *O'Reilly* a sum of 956*l.* 7*s.* 4*d.* Bank Stock was vested in four trustees, *O'Reilly* and three others, upon trust (in the events which happened on the death of Miss *O'Reilly* without issue) to pay the income to *Henry A. Peyton* for life, with remainder as she should appoint, and in default, "to her own nearest heirs and assigns." The Bank Stock still stood in the names of the four trustees.

March 23, 25.

The 22nd section of "The Trustee Act, 1850," applies to future as well as past dividends.

Bank Stock was standing in the names of four trustees, one of whom was abroad and inaccessible.

There being some inconvenience in removing him, the Court, under the Trustee Act, vested the right to receive the past and future dividends in the three other trustees during their joint lives.

This petition was presented by Mr. *Peyton* and the trustees (except *O'Reilly*), alleging that *O'Reilly*, about three years ago, went to the *United States of America*, and although the Petitioners had caused enquiry to be made there after him, they had not been able to trace his address there, or to ascertain where he now was, but they believed that he was still residing abroad out of the jurisdiction of this Court.

The petition prayed, that the right to receive the dividends now due and hereafter to accrue due on the 956*l.* 7*s.* 4*d.* Bank Stock, standing in the names of the four trustees of the settlement (including *O'Reilly*), might be vested in the three petitioning trustees alone.

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The MASTER of the ROLLS, on a previous day, made the order, but the *Bank of England*, when called upon to act upon it, objected that it was not authorized by the *Trustee Act*. &c. The matter was in consequence, at the request of the *Bank of England*, again brought under the consideration of the Court.

Mr. Cotton for the *Bank of England*, argued, that the order could not be supported, for it severed the right to receive the dividends from the legal right to the Stock itself, so that while Stock might stand in the names of two trustees, the right to receive the dividends might be vested in two strangers to the trust. That great confusion would be created in the bank books by allowing the fund itself to remain in the names of four persons, and the right to receive the dividends in three. He suggested that the proper mode of obviating the difficulty arising from the absence of *Mr. O'Reilly* would be, to displace him and appoint a new trustee under the act, and then vest the Stock in the four existing trustees, or to transfer the Stock itself into the names of the three petitioning trustees.

That at all events, the order was irregular in dealing with future dividends, to which the 22nd section did not apply. *In re Hartnall* (b), *Sir James Parker* had held, that, under the 23rd section, the Court had no authority to make an order as to future dividends.

Mr. R. Palmer, contra.

The 22nd section of the *Trustee Act* enacts, that where any persons shall be jointly entitled with any person out of the jurisdiction to any Stock, "it shall be lawful

(a) 13 & 14 *Vict. c. 60.*

(b) 5 *De G. & Sm.* 111.

lawful for the said Court to make an order vesting the right" to receive the dividends or income thereof in such person so jointly entitled. This is the present case, the words are general and apply to all "dividends and income." As to the inconvenience, it is no greater in this than in other cases under the act.

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He stated that there were real estates included in the settlement, and that litigation was pending respecting them, which rendered it inexpedient to remove Mr. *O'Reilly* from the trusteeship at present, and that the object of the present order was merely to enable the three trustees, who were residing at a distance and could not attend to receive the dividends, to grant such a power of attorney, for that purpose, as the bank would act on.

Mr. *Cotton* in reply.

The MASTER of the ROLLS. I will consider the case.

The MASTER of the ROLLS.

The question on this petition is, whether the 22nd section of the Trustee Act of 1850, applies to the case of future as well as of past dividends. It is admitted that it applies to the case of past dividends, and many orders have been made to that effect. 25 March.

By this clause it is enacted, "that when any person or persons shall be jointly entitled, with any person out of the jurisdiction of the Court of Chancery"
 "to any Stock or chose in action, upon any trust, it shall be lawful for the said Court to make an order, vesting the right to transfer such Stock, or to receive the dividends

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dividends or income thereof," "either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any person or persons the said Court may appoint."

I think that this clause applies to future as well as past dividends, and I have been unable to find any distinction between them in the words of this clause. It certainly would be a strained construction to say, that it only applies to past and not to future dividends. It would also produce this inconvenience:—that if it were impossible or extremely inconvenient for the parties to appoint a new trustee (which no doubt would get over the difficulty altogether, and bring it clearly within the scope of the act), the result would be this:—that it would be necessary to apply for a new order after each dividend became due, there being nothing in the Act to lead to that conclusion.

The case before Vice-Chancellor *Parker* arose upon the 23rd section, and it does not appear to me to make it necessary for me to come to the same conclusion upon the 22nd section. The Vice-Chancellor held, that the 23rd section only applied to past, and not to future dividends. There was a reason for that, because both trustees absolutely refused to act, and there was therefore no trustee to act, and it was fit and proper that new trustees should be appointed, and it might seem sufficient to confine the right to receive the dividend to those which had already become due. But the same reason does not apply to the 22nd section to which I have already referred, and I see no ground for restricting the words "dividends or income" in the manner suggested.

Mr. *Cotton* pointed out to me, that this might create
 considerable

considerable inconvenience to the Bank of *England*, and that in every case in which it occurred, it would render it necessary for them to open an account with respect to the dividends, separate from that of the persons entitled to the Stock itself. I was a good deal struck with that argument, for I saw that it might produce that consequence, but at the same time, I think I am not at liberty to vary the clause of an Act of Parliament, in consequence of some inconvenience that it may inflict upon particular persons. If I am to take into consideration the possible inconvenience to the Bank on the one side, I must also regard the inconvenience to the parties on the other, and I am informed, that it is not desirable to discharge Mr. *O'Reilly* and appoint another person in his place, and that the parties are desirous that he should still perform the trust when he returns to this country.

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I think, therefore, that I cannot take that matter into consideration; at the same time it is desirable that this Court should exercise the discretionary powers conferred on it by this clause, in such a manner as not to produce any unnecessary inconvenience to the Bank of *England*, and that orders like these should only be made when the circumstances of the case render them necessary.

It appears to me that the legislature have entitled the parties to the relief asked, and that this Court is bound to order it accordingly. The order therefore must stand as I originally pronounced it.

NOTE.—Upon appeal to the Lords Justices, the order was varied, (the Petitioners consenting) by limiting the order to the “joint lives” of the three trustees.—*M.S.*

1858.

ROGERS v. THE OXFORD, WORCESTER AND
WOLVERHAMPTON RAILWAY COMPANY.

24, 25 March.

The 8 & 9
Vict. c. 42
(1845) enabled
canal companies to be-
come carriers on canals, to
lease their
canals and to
take leases of
others. Subse-
quently (1856)
a railway com-
pany obtained
an act, ena-
bling them to
purchase the
X. canal and
to exercise all
its "rights,
powers and
privileges."
Held, that after
the purchase,
the railway
company had
authority to
take a lease of
Canal Y.,
under the first
act, this being
a "right, power
and privilege"
possessed by
canal X., and
which passed,
on its sale, to
the railway
company. A
motion by a
shareholder of
the railway for
an injunction
to restrain the
purchase of
canal Y. was
refused.

LONG prior to 1845, two canals had been formed, under Acts of Parliament obtained for that purpose, namely, *The Stratford-upon-Avon Canal*, and *The Worcester and Birmingham Canal*. These two canals joined each other.

In 1845, a public Act of Parliament passed (a), in order to enable canal companies to compete with railway companies, and which authorized canal companies to become carriers of goods on their own canals and on any other canals communicating therewith.

By the same act (b) canal companies were empowered to lease the tolls and duties of their canal to any other canal or navigation company for twenty-one years, and the latter were thereby authorized to accept the said lease. Certain notices were however to be given, and by the 12th section, the act was not to apply until the shareholders had determined to adopt the powers and provisions of the act to grant or accept any lease.

After this, in 1846, the *Oxford, Worcester and Wolverhampton Railway Company* obtained an act (c) to authorize certain alterations in their line, and by the 21st section, the railway company was authorized to complete a contract they had entered into to purchase the

(a) 8 & 9 Vict. c. 42.

(b) 8 & 9 Vict. c. 42, s. 8.

(c) 9 & 10 Vict. c. cclxxviii.

the *Stratford-upon-Avon Canal Navigation* and all its property and appurtenances, and which were to vest in the railway company on payment of the purchase-money. And it was enacted (sect. 24) that when the canal should become vested in the railway company, it should be lawful for the railway company "to have and hold the same, and to use, exercise and enjoy all the rights, powers and privileges of the company conveying the same, which such company could or might have lawfully used, exercised or enjoyed, in relation to such canal or navigation, *prior* to the sale or transfer thereof to the said railway company, under or by virtue of the provisions of any Act or Acts of Parliament relating to such canal or navigation, and which might be in force at the time of the conveyance thereof." The railway company accordingly purchased the canal.

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In *January*, 1851, the Defendants, the railway company, entered into arrangements with the *Worcester and Birmingham Canal Company* for taking a lease of the undertaking, and they issued an advertisement, calling an extraordinary meeting of the railway company, for the purpose of adopting the proposal for taking a lease. At such meeting, held on the 4th of *February*, 1858, they resolved to adopt the powers and provisions of the 8 & 9 *Vict.* c. 42, and to accept the lease of the tolls of the *Worcester and Birmingham Canal Company*.

A meeting of the proprietors of the *Worcester and Birmingham Canal Navigation* was also convened for the 22nd of *March*, to authorize the grant of the lease.

On the 20th of *March*, 1858, Mr. *Rogers*, a stockholder of the railway company, filed this bill, on behalf of himself and the other holders of stock, against the
 railway

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railway company and its secretary, praying an injunction to restrain the railway company from taking the lease of the *Worcester and Birmingham Canal Navigation*, &c., &c.

A motion was now made for the injunction.

Mr. *R. Palmer* and Mr. *Buck*, for the Plaintiff.

1. The Defendants must shew that they are a canal company having authority to take a lease of another canal. As soon as the Defendants purchased the *Stratford-upon-Avon Canal*, that canal company was dissolved, and although the whole property is conveyed to and vested in the railway company, still the railway company cannot exercise the powers of a canal company.

2. The Defendants must also shew, that this is a power which was vested in the *Stratford-upon-Avon Navigation* at the time they purchased it.

3. If this act enables the railway company to become lessees of this particular canal, they may become lessees of every other canal in the kingdom, to the detriment of the proprietors. They are a railway company and not carriers by canal, and they cannot change the nature of their undertaking except with the consent of all persons interested; *Colman v. The Eastern Counties Railway Company* (a).

Mr. *Selwyn* and Mr. *Jessel*, for the Defendants.

If the Plaintiff's argument prevails, the railway company has none of the powers possessed by the *Stratford Canal Company*. Under the 24th section of 9 & 10
Vict.

(a) 10 Beav. 1.

Vict., all the prior powers of the canal company are vested in the Defendants, and therefore the power of carrying goods and of taking leases of other canals.

Mr. *R. Palmer* in reply.

The MASTER of the ROLLS reserved judgment.

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The MASTER of the ROLLS.

This motion for an injunction depends on the construction of some Acts of Parliament. The bill is filed by a holder of stock of the *Oxford, Worcester and Wolverhampton Railway Company*, and it prays for an injunction to restrain the company, its directors, officers and agents, "from accepting, entering into or taking any lease of the *Worcester and Birmingham Navigation*, and the other navigations belonging thereto or under their control, and the tolls, rates and duties upon the whole and every or any part of the same canal," and also the warehouses, &c.

March 25.

The Plaintiff insists, that the Defendants are exceeding their powers, and that being merely a railway company, they are about to do something beyond that and to become canal carriers. If the matter stood there simply, there would be no question. The railway company, by becoming owners of a canal and carriers of goods on it would be acting *ultra vires*, and any shareholder would have a right to call on this Court to stop such a proceeding. If, therefore, the Defendants have any authority to do this, it must be derived from the legislature, under powers contained in some Acts of Parliament. Accordingly, the Defendants do not claim any higher powers than those conferred on them by certain Acts of Parliament. It is
 admitted

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admitted by the railway company, that no act contains an express authority for taking this particular canal, the *Worcester and Birmingham Canal Navigation*, and therefore it can only be done, if at all, under some general act.

The Plaintiff says that the question really is, whether the *Oxford, Worcester and Wolverhampton Railway Company* is a canal company within the terms and meaning of the 8 & 9 *Vict. c. 42*?

The Defendants, as I understand their argument, do not treat the matter in the same way, but they put it rather in this form:—They say that the *Stratford-on-Avon Navigation* and the *Stourbridge Extension Canals* were canals within the meaning of the 8th & 9th *Vict. c. 42*, and that the powers which belonged to these canal companies are now vested in and are exercisable by the Defendants, under the special act of the 9th & 10th *Vict. (a)*

I do not think it is very material in which way the question is put. In either way, it depends on the clauses of the Act of Parliament, and more particularly it depends on the 24th section of the 9th & 10th *Vict. (a)*

It is what is termed a local and personal act, but is declared public, and to be judicially noticed. By this act (b), power is given to “the said *Oxford, Worcester and Wolverhampton Railway Company* to purchase, and for the company of proprietors of the *Stratford-upon-Avon Canal Navigation* to sell to them, the said navigation, with all the lands, buildings, wharfs, quays,
locks

(a) *Cop. cclxxviii.*

(b) *Sect. 21.*

locks and other works connected therewith, or held or enjoyed by the said company of proprietors, and all boats, barges, stock and implements of the said company of proprietors employed in connexion with the said navigation, and all maps, books and papers relating to the said navigation in their possession or under their control, and all their powers, rights and privileges in relation to the said navigation, upon such terms and for such price or consideration as may be or have been agreed on between the said two companies." Then by the 23rd clause there is a power to purchase the *Stourbridge Extension Canal* in like manner.

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Then comes the 24th section, which is in these words :

"XXIV. And be it enacted, that when and so soon as the said *Stratford-upon-Avon* Canal Navigation and the said *Stourbridge Extension* Canal, or either of them, shall have become vested in the said railway company under the provisions hereinbefore contained, it shall be lawful for the said railway company to have and hold the same, and to use, exercise and enjoy all the *rights, powers* and *privileges* of the company conveying the same, which *such* company could or might have lawfully used, exercised or enjoyed, in relation to such canal or navigation, prior to the sale or transfer thereof to the said railway company, under or by virtue of the provisions of any Act or Acts of Parliament relating to such canal or navigation, and which may be in force at the time of the conveyance thereof; but subject to such restrictions, conditions, limitations and provisions as in such act or acts may be contained in reference to the maintenance and use of such canal and navigation, or to the use of any other canal or navigation communicating therewith."

The

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The question, therefore, which is to be considered is, what were the "rights, powers and privileges" which the *Stratford-upon-Avon Canal Navigation* "could or might lawfully have used, exercised or enjoyed in relation to" the *Stratford-upon-Avon Canal Navigation*, "prior to the sale or transfer thereof to the railway company," under the provisions of any acts then in force? If they actually had any such rights, powers or privileges at that time, it is not, in my opinion, of the slightest importance that they had not attempted to exercise them, for if they possessed any such powers, they were, by force of this act, transferred to the railway company.

I have then to consider what were their powers. Two Acts of Parliament had passed with reference to canal companies generally. One was the 8th & 9th *Vict.* c. 28, which enabled them to vary their tolls; and it is clear that the powers contained in this act were powers which, at the passing of the 9th & 10th *Vict.* c. 278, were vested in the *Stratford-upon-Avon Canal Company*, and might have been exercised by them if they thought fit. These powers therefore were transferred to the railway company on the purchase of that canal.

The second act is the 8th & 9th *Vict.* c. 42, the first clause of which enables canal companies to carry goods on their own canal or on canals communicating therewith.

By the 2nd section, the canal companies are to become subject to the bye-laws of any other company on whose canal they may act as carriers. By the 3rd, they may provide boats and power for hauling the vessels of other persons. By the 5th, they may sue and be
 sued

sued as carriers, and may prefer indictments. By the 6th, all the provisions relating to common carriers are to apply to such companies. By the 7th, they are empowered to contract with other canal companies, in order to avoid the necessity of a change of boats and other delays.

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I pause here for a moment (because the next clause (the 8th) is the one in question) to consider, whether the "rights and powers," and also the restrictions contained in these clauses, were not such as the *Stratford-upon-Avon* Canal Company might lawfully have exercised and were imposed on it at the time the *Oxford, Worcester and Wolverhampton Railway Company* had procured the act enabling them to purchase the canal. I am of opinion the railway company have enjoyed, since the transfer of the canal was made to them, all the powers and privileges contained in these clauses, and that they are, on the other hand, subject to all the restrictions contained in them.

The 8th clause is this:—"And be it enacted, that it shall be lawful for any such canal or navigation company, from time to time, by lease, to take effect in possession within six months from the letting thereof, to let the tolls and duties, or any part thereof, upon the whole or any part of such canal or navigation, or of any such railway or tramway, to any other canal or navigation company (and which lease such other canal or navigation company is hereby authorized to accept and enter into) for any period not exceeding twenty-one years from the commencement of any such lease: provided always, that no such letting shall take place, unless public notice of the intention to let such tolls, or the part thereof intended to be let, shall have been given by the company proposing to let the same,

by

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by advertisement, at least fourteen days prior to the meeting of the directors or managers, at which it shall be intended to let such tolls."

After that act passed (a), that is to say, for the space of a year prior to the passing of the 9th & 10th Vict. c. cclxxviii (b), I think it is impossible to doubt, that the *Stratford-on-Avon Canal Navigation* had full power either to lease its own tolls or to take the tolls of any other canal company, provided it adopted the steps which are here pointed out.

I am considering this, for the present, totally apart from the 12th section to which I shall presently have occasion to refer. But on this 8th clause, I cannot doubt, that the *Stratford-upon-Avon Canal Company* had power to take a lease of the tolls or to let its own tolls to another canal company.

Then comes the 24th clause of the 9 & 10 Vict. c. cclxxviii, which says, that the railway company are "to have and hold the same [canals] and to use, exercise and enjoy all the rights, powers and privileges of the company conveying the same which such company could or might have lawfully used, exercised or enjoyed in relation to such canal or navigation prior to the sale or transfer thereof to the railway company" under that act. Now if I turn this into a particular instead of a general clause, it is simply that the railway company may exercise the right of the *Stratford-on-Avon Canal Navigation*, of letting their own tolls or of taking a lease of the tolls of any other company.

This appears to me to dispose of the argument on the

(a) On the 21st of July, 1845. (b) 27th July, 1846.

the word "such" in the 24th section of the 9 & 10 Vict. c. cclxxviii, because these were powers and privileges which the *Stratford-on-Avon* Canal Company might have exercised in relation to that canal at the time when it made the conveyance to the railway company.

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It appears to me impossible to get over the effect of these words. It is quite clear, that the meaning of this clause was not to put an end to the canal company when it was transferred to the railway company, but it gave to the latter power to do exactly that which the canal company might previously have done. Therefore the canal company being, under these prior acts, enabled, amongst other things, to become carriers themselves, these powers were all transferred and vested in the railway company, and who were enabled to do the same.

I was struck with the argument, that the *Oxford, Worcester and Wolverhampton* Company is always called a railway company, and it is not, in any act, called a canal company. But the reason for that is obvious, it was established merely as a railway company, and when it became a canal company, by the purchase of a canal and obtained other powers and functions by authority of the legislature, its name was not changed: but that does not, in the slightest degree, detract from the real nature and character of the company.

Another argument was founded on the 12th section of the 8th & 9th of *Victoria*, and was to this effect:—That section provided, that the act should not apply to any canal or navigation, the property wherein is vested in shareholders, "nor shall the powers of leasing

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leasing hereinbefore contained be exercised by any such canal or navigation company, until a meeting of the shareholders thereof shall have been duly convened, in such manner as meetings are, by their respective acts of incorporation or settlement, required to be called or are usually called, and it shall have been determined by a majority of two-thirds of the votes of the shareholders in such meeting assembled, either in person or by proxy, where by such acts of incorporation or settlement voting by proxy is allowed, to adopt the powers and provisions hereby granted, or such and so many of them as it shall at such meeting be determined shall be adopted, or to grant or accept any such lease, nor to any canal or navigation the property wherein is vested in one or more owners, proprietor or proprietors," unless they "determine to adopt the powers and provisions hereby granted, nor in either case, until public notice of any such determination and intention shall have been inserted in the *London Gazette*."

Now the argument upon this clause, as I understand it, is, that as no such notices were given or such meetings held by the *Stratford-upon-Avon Canal Company*, or the *Stourbridge Extension Canal*, prior to the passing of the 9th & 10th of the *Queen*, it follows, that this was not, in fact, one of the powers possessed by the canal company prior to the sale or transfer thereof, but that it was necessary that certain forms should be gone through, by a meeting of the shareholders, before they acquired the powers and the provisions for the purpose of carrying it into effect. I was desirous to look at the matter carefully, and considering what would be the effect of this word "*prior*" (a) before I expressed any opinion. But I am of opinion that the proper mode

(a) 9 & 10 Vict. c. cclxxviii, s. 24.

mode of looking at this is, that this was a power contained in the Act of the 8th & 9th of the *Queen*, which was vested in the canal company prior to the 9th & 10th of the *Queen*, c. cclxxviii, and that these were merely modes of exercising and carrying into effect the powers vested in the company. They had a power to lease their lines to certain companies, or to take a lease of certain other canal companies. How was that power to be exercised? It was only to be exercised provided there was a certain meeting of the shareholders who, called in a particular way and voting in a particular manner, should determine to adopt and exercise that power. But the meeting did not create the power; it was created by and was vested in the canal company by the act of the 8th & 9th of the *Queen*. It was a power which they might have lawfully used, exercised and enjoyed prior to the sale to the railway company, provided they could induce, adopting the necessary forms, a certain number of their shareholders to exercise the powers so entrusted to them by the act, and which were created and vested in the canal company.

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I am of opinion, therefore, that the power and the mode of exercising it did exist, although there had been no attempt to exercise it prior to that time. I think that the power has always continued to exist, and that the mode of exercising it now is, by compelling or inducing those persons who are members of the railway company, and as such are members of the canal company, to adopt the course which is pointed out by the 12th section of the 8 & 9 *Vict. c. 42*.

I am of opinion, therefore, that this power of leasing is one which is vested in this railway company, and
that

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that this Court cannot grant any injunction for the purpose of restraining their exercise of this power.

Even if my opinion had been different, I do not think, unless I had seen that irreparable damage would be produced, that I should have granted an interlocutory injunction.

I shall simply refuse the motion, making the costs of it costs in the cause.

NOTE.—On the 22nd *April*, 1858, the Lords Justices refused the injunction, but consented to hear the cause on motion for decree. The cause was afterwards heard, with the assistance of two Common Law Judges, and the bill was ultimately dismissed with costs, on the 29th of *June*, 1858.

GURNEY v. GOGGS.

25 *March*.

Bequest of 1,000*l.* to a married woman for her own use, nevertheless, during her life, to pay the dividends, during her life, for her separate use, independent of any husband. Held, an absolute interest.

THE testator, by his will dated the 13th day of *October*, 1836, gave and bequeathed as follow :—
 “I give the sum of 1,000*l.* unto my sister, *Sarah Lombe*, the wife of *Robert Raven Goggs*, of *Thorpe*, near *Norwich*, gentleman, for her own use: *Nevertheless*, I do direct my executors hereinafter named, *during her life*, to put and place out at interest, upon government or good real security, the said sum of 1,000*l.*, and to pay to my said sister, *Sarah Lombe Goggs*, the dividends and interest accruing thereupon, half-yearly or otherwise, as the same shall become due during her life, for her own sole and separate use, independent of, and so as not to be subject to or liable to the debts, engagements, bankruptcy, control or intermeddling of her present or any future husband, and for which her receipts alone shall be effectual discharges.”

The

The testator died on the 19th of *March*, 1837.

1858.

This was a petition presented by *Robert Raven Goggs* and *Sarah Lombe* his wife, praying for payment to her out of Court of 996*l.* 5*s.* 4*d.* £3 per cent. Annuities and 14*l.* 10*s.* 2*d.* cash, which were set apart and now standing to a separate account to answer the legacy.

GURNEY
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Mr. *Hetherington* argued that the gift was absolute to Mrs. *Goggs*.

Mr. *Follett*, *contra*, contended it was a gift for life only.

The MASTER of the ROLLS.

The word "*nevertheless*" seems to some extent in derogation of the prior gift, but I think she takes an absolute interest.

HALE v. PEW.

THE testator devised a messuage &c. at *St. Alban's* to the use of his nephew, *John Hale*, for life, with remainder to *William Hale*, (son of *John Hale*,) for life, and, after his decease, to the use of one or more of *William Hale's* children as he should by will appoint, and in default, to the use of the children, and their heirs, equally, as tenants in common. And in case of failure of issue of *William Hale*, then to the use of the next and every other son and sons of *John Hale*. And on failure of sons, or a son, to the first, second and every other daughter and daughters of the said *John Hale*, lawfully to be begotten, severally, successively, and in remainder,

26 *March*.

The doctrine of *cy près* is not to be extended.

The *cy près* doctrine is inapplicable when the limitation to unborn children gives them a fee.

Trusts for sale on failure of a series of prior limitations: held, on the context, to be too remote.

1858.

HALE

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remainder, one after another, according to their priority of birth and seniority of age, the elder of such sons, and on failure of sons, the elder of such daughters, being always to be preferred to and to take a life estate in the said hereditaments and premises before the younger of such sons or daughters, as the case may be, and to have a power of appointing and devising the same unto and amongst, or to some one or more child or children of his or her body, by his or her last will and testament, or codicil, to be executed as hereinbefore mentioned. And in default of such appointment, gift or devise, the children or child of any son or daughter, as the case may be, of my said nephew, *John Hale*, who shall become a tenant for life of the said hereditaments and premises shall be entitled to an *absolute* estate and interest therein in remainder expectant on the determination of such life estate, in like manner, as is hereinbefore limited, with regard to the children or child of the said *William Hale*, and as if the same limitations were repeated in respect of the children or child of each and every other child of my said nephew *John Hale*."

"*And in case of a total failure of issue of my said nephew, John Hale, before the said hereditaments and premises shall absolutely vest in any person or persons, then I give and devise the same hereditaments unto the said Thomas Rogers and Eli Pero, their heirs and assigns, and direct that the same shall be sold, and the money arising thereby be divided amongst or be paid to such persons or person as, at the time of such failure, shall be my next of kin, the same being considered personal estate, and divided or paid according to the directions of the statute for the distribution of intestates' estates.*"

John Hale died in *December, 1844*. He had two children

children only, *Elizabeth*, who died in *April*, 1844, without having been married, and *William Hale* (the devisee for life), who died in *January*, 1855, without having had any issue.

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The Petitioner, who was the sole next of kin of the testator, at the time of failure of issue of *John Hale*, and which occurred on the death of his son *William Hale*, claimed to be absolutely entitled to the money to be produced by the sale of the property. She prayed a sale and payment to her of the produce.

Mr. *R. Palmer* and Mr. *J. H. Palmer*, in support of the petition, argued, that the ultimate limitation was valid, first, because the gifts over on failure of issue had the effect of converting the estates given to the children of *William*, and of the other sons and daughters of *John*, into estates tail; *Forth v. Chapman* (a); *Doe d. Ellis v. Ellis* (b); *Jesson v. Wright* (c); and secondly, that the obvious intention of the testator might be effected by the aid of the *cy prés* doctrine, and by giving an estate tail, *Pitt v. Jackson* (d); *Nicholl v. Nicholl* (e); *Vanderplank v. King* (f); *Jarman on Wills* (g); *Monypenny v. Dering* (h); *Williams v. Teale* (i), which had not been barred.

Mr. *Greene* and Mr. *Smythe* for the heir at law argued that the ultimate trust for sale was void for perpetuity, being limited after an indefinite failure of issue.

That the words "on failure of issue" could not limit
the

(a) 1 *Peere Wms.* 663.(b) 9 *East*, 382.(c) 2 *Bligh* (O. S.) 1, and 5
M. & Sel. 95.(d) 2 *Bro. C. C.* 51.(e) 2 *W. Blackstone*, 1159.(f) 3 *Hare*, 1.(g) *Vol.* 1, p. 242 (2nd edit.)(h) 2 *De G., M. & G.* 173.(i) 6 *Hare*, 239.

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the effect of the previous gift to the "heirs;" *Goodwright* d. *Docking* v. *Dunhow* (a), where the testator devised to his son *Jeffery* for life, and after his decease, to his children equally and their heirs, and in case he died *without* issue, to his daughters: the Court there held, "that there were no expressions to restrain the sense of the word *heirs* in the limitation to *Jeffery's* children." *Fearne's Cont. Rem.* (b). Secondly, that if one limitation was too remote, every subsequent one was equally so; *Fearne's Cont. Rem.* (c); and see *Monypenny* v. *Dering* (d); and that here, the limitation to the grand-children of *John Hale* was plainly too remote and void, and consequently the subsequent devise for sale could not be supported. Thirdly, that the doctrine of *cy près* could not be applied to such a succession of limitations as the present.

The MASTER of the ROLLS.

I cannot arrive at the conclusion that the limitation to the trustees for sale is good.

The judges have over and over again said, that the *cy près* doctrine ought not to be extended. The result of it is, that in order to effect the general intent at the expense of the particular intent, you defeat both, by putting the estate in the power of the first taker. The usual instance of the application of the *cy près* doctrine is, when you give an estate to an unborn person for life, with remainder to his first and other sons in tail, which latter limitation is clearly too remote. But applying this doctrine of *cy près*, you give to the first tenant for life an estate tail to enable all his sons to take, that is, by advancing the estate tail, which the testator desires,
and

(a) *Douglas*, 264 (4th ed.)
(b) *Page* 374 (8th ed.)

(c) *Page* 523.
(d) 2 *De G., M. & G.* 182.

and in order to carry his general intention into effect, as, if the entail be not barred, each of the sons will take in succession, as the testator intended. The consequence is, that the first taker, being tenant in tail, can then defeat all the subsequent limitations. But to extend the rule to a case where the children take in fee simple, would be to extend it far beyond what has ever been done, and the effect would be, to give an estate in fee simple to the first taker, by which both the particular and the general object of the testator would be defeated (a).

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v.
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The next question is, whether this is an estate tail? There is an estate given to *William* for life, with remainder to his children and their heirs equally. It is clear that *William* took a life estate, and that his children took in fee. "And in case of failure of issue of *William*," then the estate is given to the other children of *John* for life, with power to appoint to their own children, and if there should be no appointment, then they are to be entitled to "an absolute estate." "And in case of a total failure of issue" of *John* before the hereditaments vest absolutely in any person, then on trust for sale. That is, the trust for sale arises only after the failure of such issue as is before mentioned. I entertain no doubt that this limitation for the sale of the property is too remote and void. The heir is therefore entitled.

(a) *Bristow v. Warde*, 2 *Ves. jun.* 336.

1858.



SILVERSIDE v. SILVERSIDE.

29 March.

A testator, who had lent money to his son *John*, bequeathed his residuary estate to *John* and his other children equally for life, with remainder over to their children, and he declared, that neither of his children should receive any thing until they should have accounted for any sum lent by him to them. The testator afterwards agreed to accept a composition on his debt, but which was not paid at his death. *Seemle*, that the son was only liable to account for the composition; but held, that the son's debt was not to be deducted from his children's interest.

THE testator, by his will dated in 1853, gave his real and personal estate to trustees, upon trust to sell and invest the produce, and to pay the income to his three children, *Robert*, *Sarah* and *John*, equally, during his and her life, and after their respective deaths, he gave their shares to their children.

The testator afterwards proceeded as follows:—"And I further declare, that neither of my said three children shall be entitled to or receive any interest under this my will, until they, she or he shall have brought into *hotchpot* and accounted for *any sum* or sums of money, which, during my lifetime, shall have been *lent or advanced* to them, on security of any note or memorandum under their respective hands, or for which they or either of them, respectively, shall stand debited in my books of account kept by me."

In 1854, the testator entered into a composition with his son *John*, for a debt due to him, as after stated.

By a codicil, made in 1855, the testator varied his trustees and executors, and he confirmed his will "in all particulars, except so far as the same will was altered or varied by the codicil."

The testator died in 1855.

John Silverside was indebted to his father in 510*l.* upon notes, and on a memorandum dated respectively in 1849 and 1851, and in the month of *June*, 1854, *John Silverside* (being embarrassed in his circumstances

stances and unable to pay his debts in full), with the sanction of his father, called his creditors together, and offered them a composition of 6s. 8d. in the pound. The testator, by his solicitor, attended the meeting of his son's creditors, and as an inducement to them to accept the composition, the testator agreed to take the same for his own debt, and the other creditors thereupon consented to accept the composition and to release *John Silverside* from their several debts, but the composition was never paid to the testator, nor did the testator ever sign any release of the debt due to him from *John Silverside*.

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SILVERSIDE
v.
SILVERSIDE.

John Silverside died in April, 1856, leaving one child only, a daughter.

The first question was, whether, notwithstanding the agreement on the part of the testator, to accept from his son *John* a composition of 6s. 8d. in the pound, on the several sums due from him, the whole of such sums ought to be brought into hotchpot and accounted for as part of the share of the son *John* in the residue.

A second question was, as to whether the debts of the son *John* was to be brought into hotchpot as against his child.

Mr. *Fischer*, for the Plaintiff, argued that the whole debt and not the amount of composition ought to be brought into hotchpot and deducted from *John's* share.

[*The MASTER of the ROLLS*: That could not be contended, if the amount of the composition had been paid in the testator's life. The question is, whether the non-payment makes any difference.]

Mr.

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SILVERSIDE
v.
SILVERSIDE.

Mr. *Surrage* for the daughter of *John Silverside*.
The debt of *John* is to be deducted from his life interest only, the proviso only deals with his interest, and not with that of his children.

Mr. *W. R. Ellis* for the trustees.

The MASTER of the ROLLS.

I am quite clear that this clause does not affect the grand-children, and that *John's* life interest alone is charged with the amount lent or advanced to him.

It being found that the life interest of *John* was less than the debt, no declaration was ultimately made on the first point.

BROOKE v. BROOKE.

March 29.

Husband and wife had, for many years, lived and were still living separate. The husband remitted money for her maintenance and support. She saved a considerable portion. Held, that the husband could not recover back these savings, and a demurrer to a bill by the

THIS case came before the Court on demurrer to a bill which stated as follows:—

The Plaintiff, Major *Brooke*, married the Defendant Mrs. *Brooke* in 1820, and no settlement was executed on that occasion.

In 1824, the Plaintiff returned to *India*, but his wife, “without any ostensible cause and entirely of her own accord, ceased to reside with and left the Plaintiff and remained in *England*, and from the year 1824, down to the husband against his wife and her bankers for that object was allowed.

the present time, she lived separate and apart from the Plaintiff" at *Boulogne-sur-Mer*. The Plaintiff down to 1855 continued to reside in the *East Indies*.

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No deed of separation or other agreement or arrangement for any allowance was made; but from 1853 down to the present time, the Plaintiff voluntarily supplied his wife with between 250*l.* and 350*l.* a year "for her support and maintenance as his wife, it being intended and believed by the Plaintiff to be applied and expended by her for those purposes."

These sums were remitted by the Plaintiff from *India* to his *London* agents, and were by them either paid to the Defendant *Catherine Brooke* herself or remitted in quarterly payments to Messrs. *Adam*, her bankers at *Boulogne*.

The bill stated, that "instead of applying these annual remittances to her due support and maintenance, in a manner consistent with her position as the Plaintiff's wife, as was the intention and object of the Plaintiff in making her so liberal an allowance, she had applied only 100*l.* per annum or thereabouts to such purposes and permitted the residue to accumulate in the hands of " Messrs. *Adam*, who had " now in their hands, to the credit of the Defendant *Catherine Brooke*, a balance of 39,000 francs, or 1,560*l.* or thereabouts, consisting of the accumulations of the said annual remittances by the Plaintiff to the Defendant *Catherine Brooke*, which have remained unapplied by her to her support and maintenance as aforesaid."

That the Plaintiff, in making such remittances, " was under the impression that the whole of such remittances were

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were necessary for her due support and maintenance, according to her station in life, and would be and were applied and expended by her for those purposes, and he did not thereby intend to create or confer upon his said wife any separate estate or interest in any part of such remittances, which should not be applied or expended by her for the purposes for which they were so made by the Plaintiff, and the Plaintiff is advised that under the circumstances, the balance of 39,000 francs or thereabouts in the hands of the said Defendants, Messrs. *Adam*, is the absolute property of the Plaintiff."

That the "Plaintiff is apprehensive, that his said wife may be induced, by persons resident at *Boulogne* aforesaid, and who it is believed exercise an undue influence over her, to apply or dispose of the said balance for other purposes than those for which the said remittances were so made by the Plaintiff, and the Plaintiff is desirous of taking steps for securing to the Defendant, *Catherine Brooke*, the benefit of such balance, during her life, and at the same time of preventing her absolutely disposing of the said balance; but he is unable to take the necessary steps for that object, until the rights of the Plaintiff and his wife as to the said balance have been ascertained and declared by this honorable Court."

The bill, filed against Mrs. *Brooke* and Messrs. *Adam*, prayed, that the respective rights and interests of the Plaintiff and his wife, to and in the sum of 39,000 francs in the hands of the said Defendants Messrs. *Adam*, might be ascertained and declared.

To this bill Mrs. *Brooke* demurred.

Mr. *Renshaw* (in the absence of Mr. *R. Palmer*) in support

support of the demurrer. First, the money sought to be recovered are the savings of an allowance to the wife during the husband's absence and separation; these savings are separate estate, to which the husband has no right. Secondly, this Court will not interfere in a mere suit between husband and wife. Thirdly, the fund and all the Defendants are abroad, and this prevents the Court assuming any jurisdiction over the matter.

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 BROOKS  
 v.  
 BROOKS.

*Mr. Selwyn* and *Mr. Dryden contra*. The funds were supplied to the wife for a specific purpose and to be applied in a specified way, and that portion which has not been so applied belongs to the Plaintiff and may be recalled. If the bankers were here, an action might be maintained against them; *Messenger v. Clarke* (a).

[*The MASTER of the ROLLS*: Could the creditors of the wife sue the husband for necessaries; would it not be an answer to say—"I make her a sufficient allowance?"]

The allowance was not for her separate use, the contrary is alleged; there was no agreement, and the case is like the ordinary one of an officer in *India* remitting his wife money for the support of herself and family; she is a mere agent, and the surplus unapplied belongs to the husband.

This Court protects the saving of separate estate, because it partakes of the nature of the capital, but savings of maintenance money have not the quality of separate estate. The money was placed in the hands  
of

(a) 5 *Exch. Rep.* 388.

1858.

Вроокс  
v.  
Вроокс.

of the wife for a limited purpose, she was the mere agent of her husband. Then when and by what means did the money become separate estate? There was no contract and no declaration of trust. The money, therefore, was never impressed with that quality, and forms part of the estate of the husband. In *Barrack v. M'Culloch* (a) it was held, that "money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, and invested by her in her own name, belongs to her husband."

*The MASTER of the ROLLS.*

I think this bill cannot be sustained. The statement in the bill is this:—That thirty-four years ago this lady ceased to reside with her husband, and that from that time, down to the present, he has allowed her first 250*l.* a year, then 300*l.* a year, and then 350*l.* a year for her support and maintenance as his wife. He has done it in this manner,—he has sent the money from *India*, where he has resided until the last four or five years, to Messrs. *Crawford & Co.*, and it has by them been paid to the Defendant, his wife, or to her credit at her bankers at *Boulogne*. —

As every statement in the bill must be taken most strongly against the Plaintiff, I think, that upon this statement, it cannot be treated in any other way than as an allowance made for her separate maintenance and support. This has been going on for thirty-four years, and having during the whole of that time allowed this,  
it

(a) 3 *Kay & J.* 110.

it is impossible for him now to say, that this was not money allowed to her for her separate maintenance and support. If so, then, in my opinion it constitutes part of her separate estate. He says, it was intended to be supplied for her support and maintenance, and it necessarily follows, that it was for her separate support and maintenance, for he was residing in *India* apart from her during the whole of the period. If, therefore, it is her separate estate, she was entitled to save any portion she pleased, and to deal with the savings of her separate estate as she thought fit.

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The case of *Messenger and Clarke (a)* is a case which, according to some of the statements in the decision, seems at first to be a little startling with regard to the principles of equity, but I apprehend there can be no question that the case was rightly decided at law.

But how does the matter stand here? First, as everything is to be taken most strongly against the pleader, what evidence have I, that the whole of this money is not required for the payment of the wife's debts or for her support and maintenance. There is no allegation in the bill upon the subject, and every shilling may be required for the purpose, and she may be left penniless by taking this money away from her and be subjected to that very destitution which the Plaintiff, when he remitted the money, intended to prevent.

If the money were in this country and could not be obtained without the intervention of the Court
of

(a) 5 *Exch. Rep.* 388.

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of Equity, I should, even upon the assumption that it was not separate estate, settle every penny upon the wife.

But in my opinion, it must be treated as her separate estate as against the husband, who remitted it for her support and maintenance while he was living separate in *India*.

I am of opinion, therefore, that this bill cannot be maintained, and that the demurrer must be allowed.

BRACE v. WEHNERT.

29 March.

A. agreed to grant a lease to *B.* as soon as *B.* should have built a house, with the necessary outbuildings on the land, of the value of 1,400*l.* at the least, "according to a plan to be submitted to and approved by *A.*." *B.* agreed to build and take the lease. No plan had been approved of. Held, that no decree could be made for specific performance, and a bill filed by *A.* for that purpose was dismissed with costs.

THOMAS BRACE, on behalf of his brother *Edward Brace*, entered into the following agreement to grant a lease to the Defendant *Wehnert*.

Memorandum of agreement made the 4th day of *April*, 1854, between *Thomas Brace* (as agent for and on behalf of *Edward Brace*) of the one part and *Frederick Wehnert* of the other part. *Thomas Brace*, for and in consideration of the costs and expenses to which the said *Frederick Wehnert* will and may be put, in erecting, completing and finishing the messuage and buildings hereinafter mentioned, and of the agreements hereinafter contained on the part of *Frederick Wehnert* to be observed, performed and kept, doth hereby, for

Edward

Edward Brace, agree with *Frederick Wehnert*, that when and so soon as *Frederick Wehnert* shall have erected and built, or caused to be erected and built, one substantial brick messuage or tenement, with the necessary outbuildings thereto, of the value of 1,400*l.*, at the least, on the piece or parcel of ground here defined, and according to a plan to be submitted to and approved by *Thomas Brace* on behalf of *Edward Brace* or by *Edward Brace*, he *Thomas Brace* shall and will, at the costs and expenses of *Frederick Wehnert*, procure to be executed by *Edward Brace* a lease unto the said *Frederick Wehnert* of the said piece of ground, with the messuage, tenement and premises so to be built thereon as aforesaid for the term of eighty-three years, at the rent of [stating it].

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And *Frederick Wehnert* doth hereby agree with *Thomas Brace* in manner following, that is to say, that he *Frederick Wehnert* "shall and will, on or before the 24th day of *June*, 1855, erect and build, or cause or procure to be erected, built and completed, on the said piece of ground, a good and substantial brick messuage or dwelling-house and necessary outbuildings, of the value of 1,400*l.* at the least, according to the said plan thereof so to be submitted to and approved by the said *Thomas Brace*, or by the said *Edward Brace* as aforesaid." The agreement also contained a covenant, on the part of the Defendant, to erect and build a brick wall, and, with all convenient speed, to proceed with the erection and completion of the messuage and premises. And the Defendant thereby further agreed to accept and take such lease, as aforesaid, and to execute a counterpart thereof.

Disagreements took place between the parties. The Defendant refused to complete, and no plan having been

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 WENNERT.

been submitted or approved of, this bill was filed by *Edward Brace* and *Thomas Brace* for a specific performance of the agreement.

Mr. *Rogers* for the Plaintiffs, argued, that in the present case, the Court had jurisdiction to decree a specific performance of the contract. He relied on *The City of London v. Nash* (a), where it was held, on a covenant to build, that the lessors can come for specific performance; *Allen v. Harding* (b), where a covenant to build a house upon the glebe land was specifically performed; *Franklyn v. Tuton* (c), where a covenant that lessee's elevation should accord with adjoining houses was decreed; *Sanderson v. The Cockermouth Railway Co.* (d), where, upon an agreement to purchase necessary portions of Plaintiff's land, subject to necessary roads, &c., a specific performance was decreed. He also cited *Price v. The Mayor of Penzance* (e); *Storer v. The Great Western Railway Co.* (f); *Mosely v. Virgin* (g).

[The MASTER of the ROLLS referred to *Clarke v. Price* (h).]

Mr. *Lloyd* and Mr. *Torriano*, for the Defendant, argued, that the Court would not decree the specific performance of an agreement to build a house; and the more especially in this case, as everything was left uncertain respecting it, no plan having been submitted and approved of. They cited *Hodges v. Horsfall* (i); *Squire v. Campbell* (k); *Feoffees of Herriot's Hospital*

v.

(a) 1 *Ves. sen.* 12, and 3 *Atk.* 512.

(b) 2 *Eq. Ca. Ab.* 17.
 and 469.

(f) 2 *Y. & C. (C. C.)* 248.

(g) 3 *Ves.* 185.

(h) 2 *Wilson, C. C.* 157.

(i) 1 *Russ. & M.* 116.

(k) 1 *Mul. & Cr.* 459.

v. Gibson (a); Lucas v. Comerford (b); and see Taylor v. Portington (c).

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Mr. *Rogers* in reply stated, that the Plaintiffs were ready to approve of any reasonable plan for building to the amount stated.

The MASTER of the ROLLS.

I think that the jurisdiction of this Court, in cases of specific performance, should not be diminished, and I concur in the cases which lay down, that if the thing contracted to be done can be made reasonably clear, the Court is bound to decree a specific performance. But I think not only that the cases but the reasons for them are too strong to warrant me in giving the Plaintiff a decree for specific performance in this case.

An agreement for building a house of a certain value is not one which this Court will direct to be specifically performed. The Court would have great difficulty in determining whether its decree had or not been performed, and it might lead to much litigation.

In this case, the Court could come to no satisfactory conclusion whether the house when built, with the necessary outbuildings thereto, was or not of the value of 1,400*l.* at the least. That of itself would be a matter of very great difficulty, but if this were that simple case, I should wish to look into the authorities, in order to see if I could give the Plaintiff relief in a case where the Defendant has been in possession three

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(a) 2 *Dow.* 301.

jun. 235; 1 *Mer.* 264.

(b) 3 *Bro. C. C.* 166; 1 *Ves.*

(c) 1 *Jurist*, N. S. 1057.

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or four years. But there is this additional difficulty, these buildings are to be "according to plan to be submitted to and approved of by Mr. *Brace*," and in order that there may be no mistake in the matter, the Defendant afterwards repeats the words of the contract, and he covenants that this is what he is to do.

It is clearly impossible for this Court to decree this to be specifically performed. How can I determine on the plan? This contract is not only vague but it raises the difficulties to be found in all the cases where a specific performance is asked of something which the Court has no means of enforcing, such as to make repairs, to write a book, or exercise a discretion which the Court cannot exercise. I could never compel Mr. *Brace* to approve of a particular plan if submitted to him by the Defendant. If I were to say he was bound to approve of any plan which is reasonable (and which I think I could not do), how could I determine upon its reasonableness? The evidence would be of the vaguest possible description. I might approve of a handsome plan, and afterwards find that the expense of building the house would be beyond 1,400*l*.

The cases where the plans are already prepared differ from the present. Here the parties must rely on the honor of each other for the performance of the contract, and in case of non-performance, on their remedy by action at law for damages.

I must dismiss this bill with costs.

1858.

*In re* OSBORNE.

IN 1857, Messrs. *King*, *Blakemore* and *Hanbury* were the three conservative candidates for the representation of the county of *Hereford*.

17, 18 *March*.

The charges of solicitors employed as electioneering agents, held, taxable under the statute.

On the 14th of *March*, 1857, their agents wrote to Messrs. *Edwards* and *Osborne*, solicitors of *Ross*, in the following terms :—

“ Dear Sirs,—We beg to inform you that at a meeting this day of the friends of Mr. *King*, Mr. *Blakemore* and Mr. *Hanbury*, it was resolved to form a central committee for the conduct of the election, to whom all communications are to be made. We are to request you to accept a *retainer* on behalf of the three candidates, and to beg your immediate reply, addressed to the chairman of the above committee as above, and in order to secure an efficient distribution of *professional services*.”

On the same day, Messrs. *Edwards* and *Osborne* replied to this effect :—

“ We accept the retainer on behalf of the conservative candidates, and no effort, on our part, shall be wanting to secure their return.”

Messrs. *Edwards* and *Osborne* proceeded to act, and were fully occupied, in electioneering matters, during the seventeen days between the retainer and the election. After the election, they delivered their bills of charges to the

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 OSBORNE.

the agent for electioneering purposes, pursuant to the
 17th & 18th *Vict.* c. 102.

These bills were as follows :—

Messrs. *King, Blakemore* and *Hanbury,*

Drs. to *Edwards* and *Osborne.*

County Election. *Ross* District.

1857. £ s. d.

March and *April.*

Retainer fee 5 5 0

Selves, canvassing for eighteen days, at

3*l.* 3*s.* per day 56 14 0

Expenses 10 10 0

April 2*nd.*

Engaged, from an early hour, looking up
 voters, attending committee room, and
 acting as booth-agent to *Edde Cross-*
street booth 5 5 0

Managing clerk (Mr. *Williams*) out can-
 vassing for twenty-one days, at 3*l.* 3*s.*
 per day 66 3 0

Expenses 9 0 0

Mr. *Williams* engaged bringing in the
 voters from *Weston-under-Penyard,*
 and acting as booth-agent to the *Glou-*
cester-road booth 4 4 0

Clerk (Mr. *Bullock*) out canvassing for
 eighteen days, at 2*l.* 2*s.* per day . . 37 16 0

Expenses 11 13 6

Clerk engaged from an early hour bring-
 ing in voters from *Pencoyd* and *Lan-*
warne, and afterwards conducting
 voters to booth 3 3 0

£209 13 6

Messrs.

Messrs. King, Blakemore and Hanbury,

To *Edwards* and *Osborne*.

County Election. *Ross* District.

1857.

£ s. d.

Engaged, from 12th *March* to the 16th *March*, at offices, and from the 16th *March* to 2nd *April* in the committee room, together with clerks to very late hours each night, making out canvass lists for the various parishes, circulars to all the voters, canvass returns, correspondence, voting cards, and, generally transacting the business of the district, by which our private business was wholly neglected, and losses sustained thereby; and, subsequently to 2nd *April*, attending the several committee meetings at the *King's Head* and our offices, getting in bills, forwarding same to *Hereford*, and also engaged several days paying messengers, slip clerks, and others 150 0 0

The committee of management, considering these bills exorbitant, declined paying them, and in *January*, 1868, (*Edwards* being dead,) his surviving partner, *Osborne* commenced an action at law against the three candidates. The particulars of demand, indorsed on the writ, stated that the action had been brought to recover 359*l.* 13*s.* 6*d.*, "for work," &c. "as the *agents* of the Defendants, in and about divers matters relating to the election in and for the County of *Hereford*, and for certain fees due and of right payable to the Plaintiff in respect thereof."

On the 15th of *February*, 1858, the three Defendants
 A A 2 obtained

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obtained the common order, as of course, for the taxation of these bills and for staying the proceedings in the action. The petition for the order stated, that the Petitioners had employed Messrs. *Edwards* and *Osborne* "as their solicitors in certain matters of business," and that they had delivered their bill, "and that the same did not contain any items for business done in any of the Courts of Law or Equity."

A motion was now made, on behalf of the solicitor, that the order of taxation might be discharged for irregularity, with costs.

Mr. *Giffard*, in support of the motion. These bills, for canvassing and other election matters are not taxable under the 6 & 7 Vict. c. 73, s. 37. This work is foreign to the business of an attorney or solicitor, and requires no professional skill; it might have been equally well performed by a non-professional person, as by an auctioneer, or land agent, or shopkeeper, whose charges could never have been taxed under the statute. Lord *Langdale*, in *Allen v. Aldridge* (a), held, that the fees of a steward of a manor, though a solicitor, were not taxable. He says, "The statute does not authorize the taxation of every pecuniary demand or bill, which may be made or delivered by a person who is a solicitor, for every species of employment in which he may happen to be engaged."—"The business contained in a taxable bill may be business of which no part was transacted in any Court of Law or Equity, but I am of opinion, that it must be business connected with the profession of an attorney or solicitor—business in which the attorney or solicitor was employed, because he was an attorney or solicitor, or in which he would not have been employed, if he had not been

(a) 5 *Beav.* 401.

been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer." Testing the case by this definition, how can it be said that Messrs. *Edwards* and *Osborne*, being influential active persons, would not have been employed if they had not been on the rolls of the Court?

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In re
Osborne.

Another test is this. It was not necessary to deliver a signed bill in this case prior to commencing an action. The relation of solicitor and client, therefore, never existed between these parties, who were merely in the position of principals and agents.

Secondly. The Court has power to allow the action to proceed, and a jury would be a better tribunal for determining the *quantum meruit* in such a case as the present.

Thirdly. The petition for the order ought to have stated the special circumstances of this case, relative to the nature of the employment.

He also cited *In re Andrews* (a).

Mr. *Stallard*, *contra*. The letters shew that Messrs. *Edwards* and *Osborne* were retained as solicitors; the technical words "professional services," and "retainer," and the nature of the charges, are conclusive on that subject.

The words of the statute are very general, "any business done by such attorney," and this would include the business done by the solicitors in this case. In
Allen

(a) 17 *Beav.* 510.

1858.

In re
OSBORNE.

Allen v. Aldridge (a) the relation of solicitor and client did not exist, and in *Re Andrews* (b) it was admitted that electioneering costs were taxable.

He also referred to the 17 & 18 *Vict.* c. 102, s. 21, to shew that the candidates were unable to compound or settle the action.

Mr. *Giffard*, in reply.

The MASTER of the ROLLS: I will give judgment to-morrow.

The MASTER of the ROLLS.

March 18. In this case, I think that the Petitioners, who have obtained the order, are entitled to have these bills taxed. The 37th section of the Attornies' and Solicitors' Act, 6 & 7 *Vict.* c. 73, entitles any person who has employed a solicitor, in the character of solicitor, and who is liable to pay him his charges in respect of such professional employment, to obtain an order to tax his bill, and in the event of "no part of such business having been transacted in any Court of Law or Equity" the order is to be made here.

There may be many cases in which it is desirable that the *quantum meruit* as to professional services of this character should be determined in a Court of Common Law and by a jury; but the question before me is, whether this case comes within the provision of this section. If it does, the amount of charges must be determined

(a) 5 *Beav.* 401.

(b) 17 *Beav.* 510.

determined here. If it does not fall within the section, a jury can then properly determine what is due to Mr. *Osborne* in respect of his employment in the matters mentioned in these accounts.

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The only thing I have to consider is, whether the employment of these gentlemen was in their character of solicitors. In the case of *Allen v. Aldridge* (a), to which I was referred, Lord *Langdale*, properly and clearly, drew the distinction between those cases where the relation of solicitor and client exists, and where it did not. A solicitor may have a legal claim against another person, but it by no means follows, that it is in respect to his character of solicitor; there must be established between them, in respect to the business done, the relation of solicitor and client. In the present case, there is no question that Messrs. *King, Blakemore and Hanbury* did employ *Edwards and Osborne* to act for them in the matter of the county election, in respect of which these two bills were sent in. Therefore, the employment is established. The question is, in what character were they employed? Mr. *Giffard* argued that they were to be considered as acting as mere electioneering *agents*, in the ordinary way, and not in the character of solicitors. I cannot so treat it. It is not clear that any other person than a solicitor could have performed the duties which the candidates to represent the county required to be performed. These duties required the attendance of these gentlemen at the committees rooms, to see, amongst other things, that nothing should be done contrary to law, or which would infringe any of the provisions in the numerous statutes relative to elections; to secure that everything should be done in a legal and proper manner, and

to

(a) 5 *Beav.* 401.

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to detect the defects of the opposite party. It was therefore necessary for Messrs. *Edwards* and *Osborne* to exercise their legal knowledge in the best manner they could for the gentlemen by whom they were employed. I do not, therefore, consider that this was an employment in the same manner as ordinary unprofessional agents, but I think that they were bound to give legal advice and assistance, and which I have no doubt they did. If not, it is clear that the charges claimed in these accounts would be extravagant; for if a person who had no legal knowledge had been competent to discharge these duties, and had been employed, his charges would have been much smaller than that of professional persons able to advise and to point out the proper legal course to be adopted. I cannot consider this otherwise than as an employment in the character of solicitors, and the fact that they acted as agents in other matters does not make their claim less a claim in their character of solicitors.

The affidavits confirm this view of the case.

I am of opinion that the relation of solicitor and client is established in respect of this particular transaction, and I am satisfied that a jury would so regard it, and would be so instructed by the presiding judge, who would direct them to consider what was proper to be allowed to these gentlemen for their professional services.

As to the items of the bill, I am of opinion that "no part of such business has been transacted in any Court of Law or Equity," in which case, the Master of the Rolls has power to direct the bill to be taxed, and I am of opinion that is the course I must take.

I think

I think this was a fair case to bring before the Court, and I shall direct the costs to be costs in the taxation.

1858.

In re
OSBORNE.

In re CATER'S TRUST. (No. 1.)

THE testatrixes, *Mary Cater* and *Frances Spencer*, respectively died in 1836 and 1839.

20 March.

A trustee vexatiously paying trust money into Court under the Trustee Relief Act ordered to pay the costs of the Petitioner for obtaining payment.

Under their wills, a sum of money was held in trust for *Mary Ann Kimber*, for life, and after her decease, for her children who should be living at the time of her decease, and the issue of any child who should be then dead, such issue to stand *in loco parentis* and to take *per stirpes*.

Mary Ann Kimber died on the 25th of December, 1856, prior to which, the Rev. *Thomas Hetling* had become the sole surviving trustee of the fund. *Mary Ann Kimber* left two children surviving, and the child of a deceased child, so that the fund became divisible into thirds.

Mr. *Hetling*, being called on to transfer the fund, took the advice of an eminent counsel as to the rights of the parties, and he was advised that no doubt existed. Mr. *Hetling* was also well aware of all the above facts, for he himself stated them in his affidavit.

A long discussion, however, took place as to the share

1858.

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In re
CATER'S
TRUST.
 (No. 1.)

share of *William Carter Denby*, who, as one of the two surviving children, was entitled to one-third of the fund. It appeared, that by an agreement, dated the 21st of *January*, 1857, and made between *William Carter Denby*, of the one part, and his brother-in-law, *Albert Williams*, (a solicitor,) of the other part, which, after reciting that *Ann Elizabeth*, the wife of *Albert Williams*, was the only sister and nearest relative of the blood and kindred of *William Cater Denby*, he *William Cater Denby* did thereby agree and declare with *Albert Williams*, that out of, and for, and in consideration of, the natural love and affection which he had for his said sister, he *William Cater Denby* would, on or before the 20th day of *March* then next, transfer or procure to be transferred into the name of *Albert Williams* the parts and interest to which he *William Cater Denby* was, under the several wills of *Mary Cater* and *Frances Spencer*, entitled; to be held absolutely by *Albert Williams*. And *Albert Williams* thereby agreed, that from the actual receipt of the moneys and premises aforesaid, he would, (if the same should amount in the whole to the value of 12,000*l.* sterling,) thenceforth pay to *William Cater Denby* an annuity of 600*l.* a year, during so long a period of the term of the natural life of *William Cater Denby* as the said value should remain in the possession of *Albert Williams* unmolested and free from all adverse claim or interest.

The trustee on hearing of this document hesitated in paying over the fund to Mr. *Albert Williams*, and in the draft release sent on his behalf in *May*, 1857, a recital was introduced, that Mr. *Helling*, before making the transfer to Mr. *Albert Williams*, required that *William Cater Denby* should be represented by an independent solicitor.

This

This was accordingly done. *William Cater Denby* employed an independent solicitor and counsel, who, after conference with him, and after ascertaining his wish to abide by the deed of the 21st of *January*, 1857, settled the release on his behalf on the 7th of *August*, 1857. Mr. *Hetling* was still dissatisfied and raised further objections. A discussion was carried on for some time, he still refusing to transfer the share of *William Cater Denby*, and before the transfer had been made, Mr. *William Cater Denby* died, on the 20th of *December*, 1857, having, by his will, appointed Mr. *Albert Williams* his sole executor.

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In re  
CATER'S  
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On the 29th of *January*, 1858, Mr. *Hetling* paid into Court, under the Trustee Relief Act, to an account entitled "In the matter of the trusts of the wills of *Mary Cater*, spinster, and *Frances Spencer*, widow, respectively deceased, the share of *William Cater Denby*," the sum of 100*l.* 11*s.* 10*d.*, being the balance of a sum of 156*l.* 2*s.* 11*d.* cash, after deducting the sum of 55*l.* 11*s.* 1*d.* for costs, charges, and expenses, and 5,211*l.* 1*s.* 11*d.* £3 per Cent. Consolidated Bank Annuities.

He, at the same time, filed a long affidavit of sixteen brief pages of irrelevant matter, apparently with the intention of justifying his proceeding.

Mr. *Albert Williams* having proved the will of *William Cater Denby*, presented this petition, praying a transfer to him of the funds, and that Mr. *Hetling* might pay the costs of the application, together with the sum deducted by him for the payment and transfer into Court.

Mr. *Lloyd* and Mr. *Money*, in support of the petition,  
pressed



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pressed for the costs, and cited *Hampshire v. Bradley* (a); *Thorby v. Yeats* (b); *Firmin v. Pulham* (c); and see *Re Woodburn's Will* (d) and *Re Primrose* (e).

Mr. R. Palmer and Mr. Lindley, *contra*, cited *King v. King* (f); and *Taylor v. Glanville* (g).

The MASTER of the ROLLS.

If I gave the trustee his costs on this petition, I should certainly not allow him any costs of the opinion upon which he had not acted.

The case is a very unfortunate one. This gentleman has acted in a mode which I can describe in no other way, and by no milder term, than a species of wrong headedness. I dare say he intended to act *bona fide*, and to do what was safe; but he had received very good advice from very able and competent persons, and which any person ought to have acted on, and if he had done so, there would have been no question upon the matter. If there had been any doubt as to who were the children, a different question might have arisen, but Mr. *Helling* appears to have been quite satisfied as to that point, and no question as to the share of *William Carter Denby* ever arose. The only question was this: whether, under the agreement of the 21st of *January*, 1857, payment to the Petitioner would have been a complete and perfect discharge. A release was offered or tendered to him, which, in point of fact, was an authority from Mr. *Denby* to pay it. Besides this, on the evidence, it is quite clear, that
the

(a) 2 *Colly*, 34.

(b) 1 *Y. & Coll.* (C C.) 438.

(c) 2 *De G. & Sm.* 99.

(d) 1 *De Ges & Jones*, 333.

(e) 23 *Beav.* 590.

(f) 27 *Law J.* (Ch.) 29.

(g) 3 *Mad.* 176.

the agreement was not obtained from Mr. *Denby* by any misrepresentation or fraud; the evidence is distinct upon that subject. If the Respondent had only required, that it should be clearly established that Mr. *Denby* knew what he was about when he executed that instrument, I should not at all have complained of his conduct, or have thought him guilty of any impropriety, in requiring further evidence that Mr. *Denby* understood the effect of his release. This evidence was tendered to him, and he still refused to transfer the fund. That does not appear to me to be justifiable, nor is there any evidence stated to me which attempts to justify it. The trustee was always ready to pay the fund to Mr. *Denby*. Mr. *Denby* had transferred his interest to another person, and said "pay it to him directly," and he gave all necessary authority for that purpose; and yet the trustee still refused to pay it. This continues for eight or nine months, from *March* or *April*, till the death of Mr. *Denby* in *December*. Then the only question which had previously existed, viz. whether it should be paid to Mr. *Denby* or to the Petitioner, was put an end to, and both rights became united in the same person. If the agreement was valid, the Petitioner was entitled to the fund under it; if it was void, then the Petitioner, as executor, was entitled to it, and able to give a complete and entire discharge for it.

I regret very much the course I feel bound to adopt in this case. I was very desirous, if I could do so, in some way consistently with the rules of the Court, of relieving this gentleman from the consequences which must fall heavily upon him; but I am sorry to say I am unable to do so. I see no other mode by which I can prevent this statute being made an instrument of great oppression in many cases, than by following the course I feel

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feel bound to adopt here. There are many cases in which a trustee properly pays money into Court in order to obtain protection and to avail himself of the benefit of the statute; in such cases, he receives support of this Court and gets the costs of the proceedings. I have always been very desirous to support trustees as much as I possibly could in such cases; but after attending carefully to the evidence in this case, I find no sufficient ground for warranting me in doing that which is asked on his behalf, and though thinking him entitled to the costs previously incurred, I think he must pay the costs of this petition.

5 July.

In re CATER'S TRUSTS. (No. 2.)

Trustees, on receipt from other trustees of trust moneys, are not bound to execute a release, all that can be required from them is a written acknowledgment of the receipt of the money.

A trustee paid trust funds into Court, under the Trustee Relief Act, merely because other trustees to whom it was payable declined to give a release. He was ordered to pay the costs of getting the money out of Court.

ON the death of her mother in *December*, 1856, *Ann Elizabeth Williams* became entitled to one-third of a trust fund vested in the Reverend *Thomas Hetling* as sole surviving trustee (a). He in no way disputed her title, but it appeared that on her marriage with *Mr. Albert Williams*, in *August*, 1842, she assigned her interest to trustees, upon the usual trusts for herself, her husband and the issue of the marriage.

Mr. Hetling was willing to pay over the money on receiving a release from the trustees, but they declined to execute one. A draft release was then settled by the counsel of both parties, containing no release on the part of the trustees, but simply an acknowledgment by them of the receipt of the sums transferred. *Mr. Albert Williams* was made a party to the release.

Mr.

(a) *See ante*, p. 361.

Mr. *Hetling* was dissatisfied with a release in this form, and he refused to transfer the fund, and on the 28th of *May*, 1858, he paid it into Court under the Trustee Relief Act, to the account of Mrs. *Williams* and the trustees of the marriage settlement. He, at the same time, filed a very long irrelevant and rambling affidavit on the subject.

1858.

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In re  
CATER'S  
TRUSTS.  
(No. 2.)

Mr. and Mrs. *Albert Williams* and their trustees now petitioned for a transfer of the fund to the trustees of the settlement, and praying that Mr. *Hetling* might pay the costs.

Mr. *Lloyd* and Mr. *G. L. Russell* in support of the petition.

Mr. *Selwyn*, *contra*.

*The MASTER of the ROLLS.*

I agree very much with Mr. *Selwyn* as to the uselessness, generally, of releases, which, in most cases, really amount to very little more than a receipt; but I am quite clear, that in this case, no release by the trustees would have advanced the matter a step. But Mr. *Hetling* was not entitled to any release from the trustees; he was only entitled to an acknowledgment of the receipt of the money paid. I think that where money is due to *cestuis que trust* who have settled it, the trustee is entitled to a release from the *cestuis que trust*, but to a receipt only from the persons to whom they desire it to be paid.

I am very sorry I have no option in this case, I must make Mr. *Hetling* pay the costs.

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1858.

*Ex parte* BELTON.

21 July.

The proper mode of enforcing the delivery of a solicitor's bill is, to serve the order with a proper indorsement under the 12th Amended Order of the 11th of April, 1842, and upon default being made, an attachment will go as of course.

Alteration made in the form of the taxing order.

THE usual order had been made, *ex parte*, for the delivery of a solicitor's bill within fourteen days (a). The order was served, but without the indorsement required by the modern practice. The solicitor made default, and, on a former day, the Court had made the four day order against the solicitor.

Mr. *Nalder* now applied to the Court, stating that the Registrar had declined to draw up the order, conceiving that the client was entitled, under the 11th General Order of the 11th of April, 1842 (b), as amended by the General Order of the 18th of July, 1857 (c), to an attachment as of course.

He said that there was some doubt whether this General Order applied to orders of course.

*The MASTER of the ROLLS*: You may take the four day order, but I have no doubt that this General Order was intended to apply to all cases.

The Registrar (as I have been informed) afterwards mentioned the matter to the Court, whereupon

*The MASTER of the ROLLS* ordered the first order to be served again, with a proper indorsement, which, upon the solicitor's neglecting to deliver the bill of costs, would entitle the client to an attachment as of course.

(a) *Seton*, 423 (2nd ed.).

(b) *Ord. Can.* 166, 198.

(c) *Morgan's Ch. Acts*, 365.

NOTE.—The practice stated in 19 *Beavan*, 34 n. is now altered.

It may also be here observed, that the common order to tax has recently been altered, by directing payment "within twenty-one days after service of this order and of the Taxing Master's certificate to be made in pursuance thereof." This will make a change in the mode of compelling payment, by rendering the party in default liable to be attached at once. See also the 17th General Order of the 20th of March, 1859.

1858.

WROUT v. DAWES.

A testator devised his estates unto the three Plaintiffs, *Henry, Charles and Frederick Wrouth*, in trust for sale; the produce was divisible amongst the three Plaintiffs and two other persons.

The Plaintiffs employed Messrs. *Sturton, Key and King* as their solicitors, and through them the estates were sold by auction on the 27th of *May*, 1853. The Defendant, the Reverend *Septimus Dawes*, became the purchaser of lots 2, 3, 4 and 6, which were partly freehold and partly copyhold, for the sum of 1,600*l.* and he paid a deposit of 160*l.* to the solicitors. The Plaintiffs executed the conveyance in *September*, 1853, but it was not handed over, and they signed a receipt for the purchase-money. The Defendant was let into possession on the 11th of *October*, 1853, and in *June*, 1854, one of the partners, who happened to be the steward of the manor, caused the Defendant to be admitted to the copyhold part of the property.

As to the payment of the purchase-money, the following facts appeared:—

The same firm of solicitors had acted for Mr. *Dawes*,  
from

DATES.

|                                         |                                         |
|-----------------------------------------|-----------------------------------------|
| 1853, <i>May</i> . Sale.                | 1854, <i>Aug.</i> Account and division. |
| <i>Sept.</i> Conveyance and receipt.    | 1856, <i>Jan.</i> Deeds deposited.      |
| <i>Oct.</i> Possession given.           | <i>Feb.</i> Bankruptcy.                 |
| 1854, <i>June</i> . Defendant admitted. | <i>June</i> . Bill filed.               |

*March 19*, 29. The agent of vendors, who had authority to receive the purchase-money, had in his hands a sum belonging to the purchaser sufficient for that purpose and was directed by him to apply it in payment. The agent accordingly debited the purchaser's account and credited the vendors' account with the amount, and he rendered to the vendors an account, charging himself with that sum as received from the purchaser. Held, that this was not a valid payment to the vendors, and that they had still a lien on the estate for a part of the money lost by the bankruptcy of the agent.

The vendors had executed the conveyance and signed a receipt, which remained in the hands of

The common agent of vendors and purchaser, and the purchaser had been admitted to the copyhold estate and obtained possession. Held, that this did not vary the case.

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v.  
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from the year 1842 down to 1856, and they were engaged for him in the matters relating to the purchase in question.

In *August*, 1854, the solicitors sent a notice to the several persons entitled under the will, stating that the 18th of *August*, 1854, was appointed for a meeting, at their office, for the settlement of the testator's accounts. This was accompanied with a copy of an account, which contained, amongst the receipts, a credit for a sum of 1,600*l.* as received from the Defendant, Mr. *Dawes*, as part of the proceeds of the sale of the real estate. Upon this account, the balance divisible amongst the residuary legatees appeared to be 4,844*l.* 13*s.* 9*d.*

Four of the five persons interested attended the meeting and they received their shares, but the Plaintiff *Frederick WROUT*, not having (as he said) received the notice, though he admitted that he had received the account, did not attend, and his share of 968*l.* 18*s.* 9*d.* was not paid.

He said, that a few days afterwards, he called at the office of the solicitors and requested payment of the balance. They represented that they were "unable to pay from the circumstance that Mr. *Dawes* had not completed his purchase. Upon this representation, *Frederick WROUT* consented to the settlement standing over until Mr. *Dawes* should pay; but, at the same time, he laid a positive and express injunction on Mr. *Key*, which Mr. *Key* undertook positively to observe, against handing over or parting with the title deeds to the Defendant Mr. *Dawes* until his money was ready and *bonâ fide* paid."

Further

Further applications were made by *Frederick Wrou*t for payment, but they were fruitless. The title deeds and conveyance remained in the hands of the solicitors, and were placed with the title deeds of Mr. *Dawes* and indexed in his name. They so remained until *January*, 1856, when, under an arrangement between *Frederick Wrou*t and the solicitors, they were placed in the hands of a banker, as stakeholder, for safe custody, and not to be parted with without their joint consent. About this time, one of the partners absconded, and in *February*, 1856, the others became bankrupts, and the 968*l.* 18*s.* 9*d.* was lost.

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v.  
DAWES.

It was admitted by the Plaintiffs, that Messrs. *Sturton & Co.* had authority to receive the purchase-money, and Mr. *Dawes*, at first, represented that he had paid the balance of the purchase-money to them on the 24th of *July*, 1854. But on further investigation, it appeared, that in the year 1853, Messrs. *Sturton & Co.* had received moneys on account of Mr. *Dawes*, and that they had a balance in hand, the precise amount of which did not very clearly appear, but seemed to be about 1,756*l.*, subject to an unsettled claim for their costs. Mr. *Dawes* having given directions to them to pay the residue of the purchase-money, they on the 29th of *July*, 1854, debited Mr. *Dawes*' account with the residue of the purchase-money (1,440*l.*) and interest, and on the same day they credited the Plaintiff's account with a similar amount.

The result, therefore, was, that Mr. *Dawes* never paid the purchase-money in cash, but that it was merely carried over in the books of the solicitors.

Under these circumstances, *Henry*, *Charles* and  
*Frederick*



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WROUNT  
v.  
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*Frederick Wrount*, in *June*, 1856, filed their bill against *Mr. Dawes*, praying a declaration of their right to a lien on the freehold and copyhold hereditaments for the amount of the unpaid purchase-money and interest.

*Mr. Lloyd* and *Mr. Chapman* for the Plaintiffs relied on *Vandaleur v. Blagrove* (a); *Young v. White* (b).

*Mr. Selwyn* and *Mr. Hopwood* for the Defendant *Mr. Dawes*. The Plaintiffs have no right to single out one of the several purchasers, and make him alone liable for the whole loss of 968*l.* 16*s.* 9*d.* which has accrued; each ought to bear his share of the loss.

The solicitors received moneys of the Defendant sufficient to pay the purchase-money, they were instructed so to apply it, and had authority to receive the amount. In this state of things, they rendered an account charging themselves with the amount and accounted to the Plaintiffs for it, and the Plaintiffs adopted them as their debtors. They cannot, therefore, now have recourse to the Defendant or to his estate for payment.

The loss has arisen from the conduct of the Plaintiffs, they have conveyed the estate and have, by deed, acknowledged the receipt of the purchase-money, they have, during a long period, made no application to the Defendant on the subject, which would have given him an opportunity of insisting on a settlement and payment. They are, therefore, barred by their own laches.

[*The MASTER of the ROLLS*: I am with the Plaintiffs at present, if they have not adopted the solicitors as their debtors.]

Mr—

(a) 6 *Beav.* 565.

(b) 7 *Beav.* 506.

Mr. *Lloyd* in reply. Until the answers disclosed them, the real facts were never known to the Plaintiffs. The only payment has been by a transfer of a debt from one party to another, and a vendor is not to be considered as paid, by wiping off the bad debt of his agent, and thus being paid by a bad debt instead of in cash. If that fact had been stated in the account, it might have been said, that the Plaintiffs adopted the solicitors as their debtors, but to constitute adoption or acquiescence there must be a knowledge of the facts and circumstances adopted and acquiesced in. There has been no payment either in law or in equity, and the vendors' lien has never been discharged.

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2ndly. As to the time which has elapsed between *August*, 1854 and *February*, 1856, the evidence shews that constant applications were met by statements that Mr. *Dawes* had not completed. The Plaintiffs have relied on the title deeds and conveyance remaining in the solicitors' possession, and while they had that security, it was unnecessary to apply to the Defendant, who could not sustain a bill for their delivery, except on payment of the unpaid purchase-money.

*The MASTER of the ROLLS* : I will look over the papers in the case.

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*The MASTER of the ROLLS.*

This is a question of some nicety, and it involves the determination of which of two innocent persons shall bear the loss occasioned by the defalcation of solicitors, who

29 March.

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who were, in the matter in question, the common agent of both.

The Plaintiffs are the trustees under the will of *John Wrou*t deceased, who died in *November*, 1852, and, in that character, they sold the real estate of the testator. The sale took place in *May*, 1853, and the Plaintiffs employed, as their solicitors and agents for this purpose, Messrs. *Sturton*, *Key* and *King*. The Defendant was the purchaser of lots 2, 3, 4 and 6 for the sum of 1,600*l.*, of which 160*l.* was paid at the time by way of deposit, and 1,440*l.* remained due. The Defendant also employed Messrs. *Sturton*, *Key* and *King* for the purpose of making this purchase, and the sum of 968*l.* 18*s.* 9*d.* still remains unpaid to the Plaintiffs in respect of the purchase-money. The Defendant says, that Messrs. *Sturton*, *Key* and *King* had in their hands moneys belonging to him, and that they were expressly authorized to apply it in payment of this purchase-money; that the Plaintiffs accepted them as their debtors, and that they cannot now maintain any claim against the Defendant in respect of the balance remaining unpaid.

In the absence of any special circumstances, I think this clear, viz., that, on the one hand, if the Defendant had paid the purchase-money to Messrs. *Sturton*, *Key* and *King*, this would have been a complete discharge to him, and that if the Plaintiffs had not received it from *Sturton*, *Key* and *King*, they would have lost all remedy against the Defendant, and would not have been entitled to any lien on the property for the unpaid purchase-money.

On the other hand, it is, in my opinion, equally clear, that if an agent for the sale of property owes the purchaser

chaser a sum of money, such purchaser cannot obtain payment of his own debts and discharge himself from the purchase-money, by merely directing his agent and debtor to pay to the vendor the sum he owes to the purchaser. The matter may of course be qualified by various circumstances, such as by the absence of proper care on the part of the vendor, or by his accepting the common agent as his debtor, with a full knowledge of the circumstances.

The additional facts of this case as to this matter are as follows:—The sale took place in *May*, 1853, the Defendant then paid the deposit of 160*l.* and owed 1,440*l.* At that time, Messrs. *Sturton & Co.* were his debtors, they had received for him, on the 24th of *March* previously to the sale, the sum of 2,359*l.* 4*s.*, and accordingly they had, at that time, that money in their hands belonging to him. In the month of *September* following, they received for him the further sum of 697*l.* 10*s.* The Defendant was let into possession of the property purchased by him on the 11th of *October*, 1853; he directed Messrs. *Sturton & Co.* to pay the purchase-money to the Plaintiffs, out of the money they had in their hands belonging to him; the exact time when he did this does not appear: it was not done by any writing, but verbally. The time is not very material, but I assume it to have been done at or about the time when he entered into possession. The deed of conveyance was executed by the Plaintiffs in the month of *September* following, and a receipt for the purchase-money was signed by them. The deed of conveyance, however, was not delivered over to the Defendant nor were the title deeds of the estate, but they were kept together by Messrs. *Sturton & Co.*, and as appears from the evidence of *Thornton*, their clerk, in a box appropriated for the papers and deeds of the Defendant. The fact, however,

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however, undoubtedly is, that Messrs. *Sturton & Co.* never lost the control over the deeds and papers, and that they were never delivered over nor got into the possession of the Defendant. In *June*, 1854, Mr. *Key*, one of the partners, who was also steward of the manor, presented the indenture as the Court Baron, and caused the Defendant to be admitted to the copyhold.

In *July*, 1854, Mr. *King*, one of the partners of the firm of *Sturton & Co.* died. On the 16th of *August*, 1854, a meeting took place at the office of Messrs. *Sturton & Co.*, for the purpose of settling the accounts of the testator's estate. It was attended by the two first Plaintiffs on the record, and by Mrs. *Gibbons* and Mr. *Robert Wrou*t, who, together with the last-named Plaintiff *Frederick Wrou*t, were the only persons interested in the residue of the estate of the testator. At this meeting, a paper was produced which gave an account of the estate of the testator, and by the heading of that account Messrs. *Sturton & Co.* treated themselves as having received the purchase-money for all the lots of the estate sold, including the sum of 1,600*l.* from the Defendant Mr. *Daves*. On the other side of the accounts, the expenses and payments were set forth, shewing a balance of 4,844*l.* 13*s.* 9*d.* divisible between the five residuary legatees, the share of each amounting to 968*l.* 18*s.* 9*d.* Four of these sums were paid to or accounted for by Messrs. *Sturton & Co.* to the four other persons beneficially interested, viz., the two Plaintiffs and Mrs. *Gibbons* and Mr. *Robert Wrou*t, but the balance has never been paid. The Plaintiff *Frederick Wrou*t, who was not present at that meeting, made repeated application to Messrs. *Sturton & Co.* for the balance; they stated that they were unable to pay it, because the Defendant had not paid his purchase-money.

money. The Plaintiff *Frederick Wroat* never made any application to the Defendant for payment, but he contented himself with directing Messrs. *Sturton & Co.* not to part with the conveyance or title deeds until the purchase-money had been paid. Matters proceeded in this way through the whole of the year 1855. In *December*, 1855, Mr. *Key* absconded, and the firm of Messrs. *Sturton & Co.* were then on the eve of bankruptcy, and in *January* following, the Plaintiff *Frederick Wroat* insisted on the deed of conveyance, and the title deeds of the estate, being deposited with Messrs. *Garney & Co.*, bankers of *Holbeach*, for security. This was done in the joint names of *Henry Wroat* and Messrs. *Sturton*, inasmuch as the firm claimed, as against the Defendant, a lien on these deeds for unpaid costs. In *February*, 1856, the firm became bankrupt, and the Plaintiffs made this claim against the Defendant.

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The Defendant, having been admitted tenant of the copyhold, is invested with the legal estate. There is a long unsettled account between the Defendant and Messrs. *Sturton & Co.*, the result of which is not ascertained. I assume it to be true, that from the date of the purchase, or at least from *September*, 1853, till the present time, after attributing a proper portion of the money in their hands to the payment of the purchase-money of the copyholds, a balance has always been and is now due to the Defendant from Messrs. *Sturton & Co.* It is also proved to my satisfaction, that the Plaintiffs were never aware of, and never sanctioned the peculiar mode of payment of the purchase-money insisted upon by the Defendant. The account I have referred to certainly does not give any such information. The utmost that can be said of it (treating it in the manner most favourable to the Defendant)

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defendant) is, that it asserts that the whole of the purchase-money has been paid by the Defendant to Messrs. *Sturton & Co.*; but if so, that payment would be presumed to be in the manner usual in such cases, viz., by actual payment of the money in cash after the sale, and not by writing off a debt due to the purchaser from the agent. If there had been such a payment in cash, it would, no doubt, have exonerated the Defendant, but I am of opinion, that the Plaintiffs cannot be treated as having acquiesced in and sanctioned an arrangement of which they were ignorant, or as having consented that the transfer of the debt of *Sturton & Co.* from the Defendant to them should be treated the same as if the Defendant had actually paid the purchase-money in cash to *Sturton & Co.*, more especially when the fact whether *Sturton & Co.* had sufficient money of the Defendant's to make such a payment might depend upon the settlement of an account. I think that this writing off of a certain amount of a debt cannot be treated as a payment to Messrs. *Sturton & Co.*

In the case of *Lambarde v. Older (a)*, I was of opinion, that a creditor of an intestate could not purchase, from the legal personal representative, goods belonging to the intestate, and pay for them by wiping off the debt which was due to him from the intestate's estate. In that case I held, that the creditor must only come in for a dividend *pari passu* with the other creditors, and that if this species of set-off were allowable, the legal personal representative would not be justified in selling to a creditor.

I look at this case on the same principle. Suppose *Sturton & Co.* had been employed by the Plaintiffs to sell

(a) 17 Beav. 542.

sell the copyhold by private contract, and had agreed with the Defendant to sell them to him for 1,600*l.*, the Defendant could not have paid for the purchase, so far as the Plaintiffs are concerned, by transferring to them the debt due to himself from *Sturton & Co.* If he could, the sale, in my opinion, could not have been justified on the part of *Sturton & Co.*, unless the circumstances had been disclosed beforehand to the Plaintiffs and sanctioned by them. In like manner the Plaintiffs might here, if this mode of payment were allowable, have objected to sell the copyholds to any one who was a creditor of their agents; for it may be reasonably inferred, that if these copyholds had been sold to another person, who had actually paid the 1,440*l.* to Messrs. *Sturton & Co.*, the Plaintiffs would have had a much better chance of being paid their purchase-money: therefore this sort of set-off cannot be treated, in the first instance, as a payment of the purchase-money. But one of the most serious objections to the contention on the part of the Defendant is, that if it be correct, the question of payment or nonpayment of the purchase-money must depend on the taking of the accounts between himself and the firm of *Sturton & Co.*, involving the making out, delivery and taxation of their bill of costs, with all which matters the Plaintiffs have no privity and must necessarily be ignorant of, and which they cannot be required to go into; and yet, in the Defendant's view of the case, they would have a most material interest in.

I have then to consider, whether any circumstances exist, in this case, to deprive the Plaintiffs of that which, in my opinion, would be their right in an ordinary case. I have already disposed of the argument arising from the Plaintiffs' settlement of account with Messrs. *Sturton & Co.*, and stated why, in my opinion,
that

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that does not amount to any acquiescence in the Plaintiffs. I think the fact that the Defendant has obtained the legal estate in the copyhold, by being admitted by Mr. Key, is not a matter of any importance. If, independently of that circumstance, a lien exist for unpaid purchase-money, the lien would exist where the legal estate had been conveyed by the vendor to the purchaser, who has been put into possession, as against that purchaser, for any portion of the purchase-money remaining unpaid.

The next question is, whether the conduct of the Plaintiffs has been such that they have, by laches, forfeited the right to enforce their lien? In *October*, 1853, the Defendant was put into possession with the knowledge of the Plaintiffs, the conveyance was executed by them in *December* following, and the receipt for the purchase-money signed by them. A meeting took place to settle in *August*, 1854, and from that time down to the bankruptcy of *Sturton & Co.* in *February*, 1856, no word is said or communication made to the Defendant on the subject of his purchase-money, which the Plaintiffs allege and believe to have been unpaid. I think the fact that the deed of conveyance was not delivered over to the Defendant, and that the title deeds of the property were still in the possession of the agents of the Plaintiffs and that they were known by them to be so, is a sufficient justification to them for not having applied to the Defendant before. I think also that this neglect of theirs is balanced by the neglect of the Defendant in not requiring the title deeds and deed of conveyance to be delivered up to him. I regard, as wholly immaterial, the circumstances whether the title deeds and the deed of conveyance were placed in a box, which had the name of the Defendant or the name of the Plaintiffs on it, or whether it was kept with the

the papers of the one or of the other. In either case, they were in the custody of *Sturton & Co.*, and they were known by both Plaintiffs and Defendant to be so. As long as they were, the Plaintiffs were entitled to believe that their lien for the purchase-money unreceived by them remained secure; and the Defendant was bound to know, that as long as the deeds were in the custody of the common agent, the transaction could not be complete, so far as the transfer of those documents from the Plaintiffs to himself was essential for that purpose.

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I look at the case in the same way as if the Defendant were requiring the delivery up of these papers: could I order them to be delivered up without payment of the purchase-money remaining unreceived by the Plaintiffs? I am of opinion that I could not, and if I could not, it must be because a lien exists for the unpaid purchase-money, and if such a lien exists, I am bound to afford the Plaintiffs the relief they ask, by giving effect to it.

In fact, in my opinion, all these circumstances, when fully considered, still leave the case where it was at first, viz., was the attribution of the debt due from *Sturton & Co.* to the Defendant to payment of the purchase-money a good payment to the Plaintiffs of such purchase-money, as between the Defendant and the Plaintiffs? I am of opinion that it was not, both on principle, and on the authority of the case of *Young v. White(a)*, which applies expressly to it, and consequently that the Plaintiffs are entitled to the usual decree.

A harder case, as I have stated in the outset, can scarcely

(a) 7 *Beav.* 506.

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scarcely exist; it is which of two innocent persons shall bear the loss occasioned by the defalcation of Messrs. *Sturton & Co.*

The decree usual in cases of vendor's lien for unpaid purchase-money must be made.

FEATHERSTONHAUGH *v.* TURNER.2, 3, 23 *March.*

A person selling a share in his business and becoming a partner with the purchaser, for an indefinite period, would not, in equity, be permitted to dissolve the partnership immediately afterwards, and retain the premium.

A surgeon sold one-fifth of his business and entered into partnership with the purchaser for such term as they should mutually agree to continue. The articles provided, that

MR. *TURNER*, the Defendant, who had long carried on the business of a surgeon, agreed to take Mr. *Marsh*, his assistant, into partnership.

Accordingly, by articles of agreement entered into between them, and dated the 1st of *January*, 1856, after reciting that Mr. *Turner* had agreed to sell to Mr. *Marsh*, one-fifth of his business, for two years purchase, computed at 800*l.* for the one-fifth, they agreed to "become and continue" partners, from the date thereof, "*for such term and time as they should mutually agree so to continue partners.*"

The premises on which the business was carried on, and the instruments, implements and the fixtures, stock and effects used in the business, were to remain the separate property of Mr. *Turner*, for the use of which he was to receive an annual sum. Mr. *Turner* was to receive

in the event of the death of a partner, the survivor might purchase his share and interest in the business, but if he should decline, it should be sold to any other person. The purchaser died at the end of fifteen months, and the surviving partner declined either to purchase or to admit a purchaser into the business. He was charged with the value of the deceased partner's share and interest.

receive four-fifths of the profits, and Mr. *Marsh* the remaining one-fifth.

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The articles then proceeded as follows :—"That if, during the said co-partnership, either of the said parties shall die or be absent for the space of six consecutive calendar months, or become incapacitated from fulfilling the contract or agreement hereinbefore contained on his part, it shall be deemed and taken to be a retirement from the said co-partnership business and practice, by and on the part of such absent or incapacitated partner, and a dissolution of such co-partnership, as if the same had happened by or through the death of such last-mentioned partner; and then and in either of the said cases, which shall first happen, it shall be lawful for the surviving or continuing partner (and he shall have the right of preemption accordingly) of purchasing the share and interest of such dying or retiring partner of and in the co-partnership business and practice, at and after the rate of two years purchase for the same, to be calculated upon the gross receipts for the previous year of the said co-partnership, ending on the 25th day of *December* then preceding, and also all his estate and interest, if any, in the messuage and premises, wherein or whereon the said business or practice shall, for the time being, be carried on, and in the stock, fixtures, implements and things then belonging to or used in the said business or practice, for such price or sum at which the same shall be valued or appraised by two indifferent persons, one to be named on each side, or in case of neglect or refusal by either party to name such valuer or appraiser, then both to be named by the other of them, and such referees shall choose an umpire before entering on such valuation, in the ordinary or usual way, in case they should differ thereon, and that such surviving or continuing partner shall be allowed and entitled to the
space

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space or time of twelve calendar months for paying or discharging the amount of such purchase, upon his giving and entering into a bond, with sufficient surety, for the due payment of the said moneys, aggregately, with interest at the expiration of such twelve calendar months accordingly; or in case such surviving or continuing partner shall decline to purchase the share and interest of and in the said co-partnership business and effects of the partner so dying or retiring therefrom, then and in such case, such share and interest, of and in the said co-partnership business, shall or may be sold and disposed of to any other person who may be willing or desirous to purchase the same."

Mr. *Marsh* died on the 20th of *March*, 1857, and the Plaintiff was his administratrix,

Mr. *Turner* declined to purchase the share of Mr. *Marsh*, and he refused to admit any purchaser of his share into the business,

The administratrix of Mr. *Marsh* filed this bill against Mr. *Turner*, praying that he might be restrained "from excluding from the business any competent and qualified surgeon who might be willing to purchase the share and interest of Mr. *Marsh* in the co-partnership, or that the Defendant might be directed to pay to the Plaintiff (as such administratrix) such a sum, by way of compensation, in the nature of unliquidated damages, or otherwise as this Court might direct." It also prayed a receiver, and that the partnership accounts might be taken,

Mr. *R. Palmer* and Mr. *Stewart Macnaghten* for the Plaintiff. Under the partnership articles, the Defendant is bound, either to purchase "the share and interest of and in the partnership business" of the deceased partner

partner, or to allow a sale of it to a third party. He refuses to buy or to allow a sale, and therefore he must be charged with the value of it, which the parties have fixed at two years' purchase, or return a proportionate part of the consideration, or answer in damages, to be fixed by the Court.

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Mr. *Selwyn* and Mr. *Martindale* for the Defendant. The Plaintiff has a right to sell the share and interest of the deceased in the business and his personal good will, but the contract contains no provision that any stranger shall be forced as a partner on the Defendant. The partnership is at will, and if the Defendant were compelled to enter into one with any accidental purchaser, he could determine it at once. This provision was intended to apply to the case of the Defendant dying.

Mr. *R. Palmer* in reply.

The following cases were cited:—*Bury v. Allen* (a); *Freeland v. Stansfeld* (b); *Blisset v. Daniel* (c); *Buxton v. Lister* (d); *Hercy v. Birch* (e); *Astle v. Wright* (f); *Moore v. Moore* (g).

The MASTER of the ROLLS.

I will not dispose of this case now ; there is great difficulty in it ; but I am satisfied that the question depends upon the construction of the agreement.

I cannot, without being armed with authority, award a sum of money to the Plaintiff. My impression is, that

(a) 1 *Collyer*, 589.
 (b) 2 *Smale & G.* 479.
 (c) 10 *Hare*, 493.
 (d) 3 *Atk.* 383.

(e) 9 *Ves.* 357.
 (f) 23 *Beav.* 77.
 (g) 25 *Beav.* 8.

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that I must direct the share of the deceased partner to be sold, and then consider upon what terms and subject to what conditions of sale the sale is to take place.

I shall be glad if the parties would arm me with authority to say, what, if any, sum I consider proper to be paid by the surviving partner. I am disposed to think I cannot do that without the consent of both parties.

Mr. *R. Palmer*. The Plaintiff is quite ready to consent.

The MASTER of the ROLLS.

23 March. The Defendant refuses to buy Mr. *Marsh's* share in the business, and, in point of fact, refuses to allow it to be sold. He insists that, with the exception of the one-fifth part of the outstanding debts due to the partnership down to the decease of Mr. *Marsh*, nothing whatever is owing to his estate. I cannot accede to that view of the case, which would, in truth, reduce this clause to a mere nullity. Considering the expense and delay which would be occasioned by the literal interpretation of the partnership articles, and by carrying the same into effect, I suggested to the parties the propriety of leaving it to me to consider what was a proper sum to be awarded, in the shape of damages, for any interest which Mr. *Marsh* might have had in the partnership. I expressed my doubt whether, except by the mutual submission of the parties, it was within the power of this Court to enter into a consideration of that question. The Defendant, who has a right to insist on having the meaning of these words construed, has declined to accede

accede to that proposal, and insists on having the rights of the surviving partner and the estate of the deceased partner declared.

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I will refer again to the partnership articles in order to determine their meaning. The first clause (omitting the parenthetical part which applies only to the partner being absent or becoming incapacitated) will read thus:—"If during the said co-partnership either of the said parties shall die, it shall be lawful for the surviving or continuing partner (and he shall have the right of pre-emption accordingly) of purchasing the share and interest of such dying partner of and in the co-partnership business or practice, at and after the rate of two years' purchase for the same, to be calculated upon the gross receipts." It then provides how that shall be done, but there is nothing binding the surviving and continuing partner to adopt that course. Then the articles provide that if the surviving partner shall decline to purchase the share and interest of the partner dying, it shall be sold to any other person willing to purchase the same.

Now, undoubtedly, there is a very considerable degree of difficulty in construing this clause, which arises from the circumstance, that the principal part of the profit of the business depends on the professional skill and knowledge of the person who conducts it: the person who buys it may know nothing; and it is impossible to compel two persons to carry on business together; but, at the same time, if persons enter into a contract of this description, I must, if possible, give not only a meaning but also effect to it.

It is impossible for me to adopt the view which Mr. *Selwyn* endeavoured to press upon me, that this clause

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had reference solely to the probability that the elder partner would die before the younger, and that in fact, the clause is only referable to the event of Mr. *Marsh* surviving Mr. *Turner*. To come to that conclusion I must read these words "if during the said co-partnership either of the said parties shall die," thus:—"if during the continuance of the said co-partnership the said *William Turner* shall die." Now it is impossible for me to come to any such conclusion, or to construe the words in that way. Though very few, and probably none, of the "stock, fixtures and implements" belonged to Mr. *Marsh*, so that this part of the clause of the partnership articles would only apply to the property of Mr. *Turner*, yet, in the progress of the partnership, those circumstances might become considerably altered. It is clear that the clause distinctly applies to both the partners, and it must be so treated. It is only necessary to mention what would have occurred in the event of Mr. *Turner* dying first, for the purpose of shewing that exactly the same course which would have been taken then, must be taken now. But Mr. *Turner* declines to purchase and therefore the second part of the clause comes into operation, which is "or in case such surviving or continuing partner shall decline to purchase the share and interest of and in the said co-partnership business and effects, of the partner so dying or retiring therefrom, then and in such case, such share and interest of and in the said co-partnership business shall or may be sold and disposed of to any other person who may be willing or desirous to purchase the same."

However considerable the difficulty may be, I must carry those words into effect. In the first place, I must endeavour to sell the share of the partner dying. It is very possible and highly probable, that unless Mr. *Turner*, the surviving partner, will give great facilities
for

for that purpose it will be extremely difficult to effect a sale: and if no facilities should be given for that purpose, and the attempt to sell prove abortive, the question will then arise, whether, according to the true spirit of these articles, it will not be the duty of this Court to ascertain what the interest of the deceased partner in this concern was at the time of his decease, to fix a price upon it and to charge the continuing and surviving partner with that price. This is quite distinct from the question of pre-emption, because if the surviving partner bought the share of the business, he was to buy it at two years' purchase on the gross receipts of the business for the previous year. That is a perfectly distinct thing from ascertaining what the value of the interest of the deceased partner was.

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The question which created the principal difficulty to me was this:—whether the interest of the deceased partner did not continue in the profits made by the firm subsequently to his death, and whether, in that event, he would not be entitled to a share of them down to the present time when the business was sold. If so, the share of the profits would have to be calculated in this manner:—The Court would have to ascertain the amount of the net profits made by the concern (after making a liberal allowance and compensation to the surviving partner Mr. *Turner*, for his knowledge, time and trouble in carrying on the business) and would then have to divide it into fifths, giving one-fifth to the estate of the deceased partner. Many of the words of the clause I have read certainly point in that direction, because, what interest is there of the surviving partner to sell if he has no capital in the concern and no property in the utensils, goods, stock in trade, fixtures or implements with which the business is carried on, and if he has brought no connection to the business?

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business? If he has none of these it is difficult to say what interest he has in the concern. The other part of the clause, which I omitted, expressly points to the fact, that absence and incapacity shall be treated as a dissolution of the partnership, in the same manner as if the person had died. It follows, that death must be treated as a dissolution of the partnership, and yet the interest of the surviving or continuing partner is to be sold. I cannot, therefore, as I was at first inclined or disposed to do, treat this as a continuing partnership, except so far as there were any goods, stock, fixtures, implements or things belonging to the deceased partner, or any connection in the partnership derived from persons brought to it through the deceased, as to which I shall direct an inquiry. What I propose to do will be this: I shall refer it to chambers to sell the share of Mr. *Marsh* in the co-partnership business and to settle and consider the conditions of sale necessary and fit for that purpose; I shall then see what course the Defendant takes in this matter. My present opinion is, that if the Defendant, which he may do by means of obstruction, shall prevent every one purchasing and coming into a partnership, which will merely lead them into dissension and trouble, I shall, in that event, ascertain what was the interest and share of the deceased partner in the partnership business. I propose to insert into the decree, that in case it shall appear that such interest cannot be sold, then let there be an inquiry, what was the share and interest of the deceased partner, Mr. *Marsh*, in the business at his death. I will also direct an inquiry whether any stock, fixtures, implements or other things used in the business or practice belonged to Mr. *Marsh*.

[Mr. *Macnaghten*. It is admitted there were none.]

The MASTER of the ROLLS. Then that may be omitted.

omitted. I shall then direct an inquiry whether any of the customers were brought to the business through *Marsh*, and what part of profits made subsequent to his death are attributable to them.

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[*Mr. Selwyn*. If the Court should express an opinion as to what course the Defendant ought to take, he would be extremely anxious not to act inconsistently with it. But if not, he will be placed in a position of great difficulty: if a gentleman came and told him he was about to purchase, *Mr. Turner* would say, "My view is, that you are purchasing a partnership which I shall have the power of dissolving."]

The MASTER of the ROLLS. That is not my view of the case. This partnership having been entered into between *Mr. Turner* and *Mr. Marsh*, in consideration of 800*l.* paid by *Mr. Marsh*, I think it was not in the power of *Mr. Turner* to dissolve it the next day and keep the 800*l.* in his pocket. This Court would have interfered, and though he might have put an end to the partnership, he would have been compelled to repay the consideration. The contract entered into was this: they stipulated, that in case of *Mr. Marsh's* death, his representative, or in case of his retirement he himself, or in case of incapacity the persons who had the care of him during that time, should have the power of putting a person precisely in the position that he was in. It was not a partnership to be dissolved merely at will, and although I admit there is considerable difficulty in carrying it into effect, because one cannot tell what *Mr. Turner* will do, still it is his duty to give what facilities he can for the sale of *Mr. Marsh's* share of the business, so as to put the purchaser in the same position as *Mr. Marsh* was in. If *Mr. Turner* should not do that, then I am of opinion that it will be incumbent upon

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upon me to ascertain the value of the share and interest and to fix the Defendant with the amount. And if any customers who were introduced to the concern by Mr. *Marsh* have, since his death, continued to employ Mr. *Turner*, whereby he has derived a profit, it must be ascertained how much of the profits of the concern have been derived from that source, after making a due and liberal allowance to Mr. *Turner* for his time and knowledge in realizing those profits, by giving advice and furnishing medicines. I admit I foresee great difficulty in working out this matter, but I have no option, and must make a decree to the effect I have stated.

ABSTRACT OF DECREE.

The Defendant having declined to purchase the share and interest of *Marsh* in the co-partnership business, let it be sold, and let the conditions of sale be settled by the judge. And in case no *bond fide* sale of such share and interest can be effected, then,—

1. Inquire what such share and interest of *Marsh* was, in such co-partnership business, at the time of his death, and it being admitted by the Plaintiff that there were no fixtures, goods, stock and things used in the said business which belonged to *Marsh*, his Honor doth not direct any inquiry as to this, but doth order,—

2. An inquiry, whether there were any customers of the co-partnership firm who had become customers by reason of *Marsh's* being a partner, and if so, whether any profits of the co-partnership business have been made since the death of *Marsh*, properly attributable to or derived from such customers, and if so, take an account of such profits, and in taking such account all just allowances are to be made to the Defendant. And let an account be taken of all dealings and transactions between *Marsh* and the Defendant as co-partners.

The chief clerk took the accounts thus:—He credited the estate of *Marsh* with one-fifth of the net profits for the fifteen months down to his death (347*l.* 2*s.* 4*d.*), together

gether with one-fifth of two years net profits for his share and interest in the partnership (555*l.* 7*s.* 11*d.*) He then deducted therefrom the unpaid purchase money (251*l.* 9*s.* 4*d.*) and the sums received by *Marsh* in his lifetime (276*l.* 4*s.*), thus leaving 374*l.* 16*s.* 11*d.* due to his estate from the Defendant.

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The Defendant moved to vary the certificate, but his application was refused with costs, and on further consideration, an order was made for payment of the balance found due, together with the costs of suit.

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KERR v. PAWSON.

The vendor of a copyhold estate enfranchised under "The Copyhold Act, 1852," is not bound to shew the lord's title.

After the passing of "The Copyhold Act, 1841," and "The Copyhold Act, 1852," but before "The Copyhold Act, 1858," an agreement was entered into for the sale of a copyhold estate, together with the timber "and all appurtenances to the same hereditaments belonging," as soon as the same should become freehold, under an agreement of the vendor to use his best endeavours to enfranchise. An enfranchisement was effected under the second act,

reserving the minerals to the lord. Held, that the contract had reference to the provisions in those acts relative to minerals, &c., and that the purchaser must complete, notwithstanding this reservation.

THE question in this case was whether, as between vendor and purchaser, a good title had been shewn, and it arose upon the Copyhold Enfranchisement Acts, viz., the 4 & 5 Vict. c. 35 (the voluntary enfranchisement act), and the 15 & 16 Vict. c. 51 (the compulsory enfranchisement act). The latter passed on the 30th of June, 1852.

The following were the circumstances of the case.

The Plaintiff, being the owner of some copyholds held of the manor of *Hendon*, but to which he had not been admitted, entered into a contract for the sale of them to the Defendant. The contract was dated the 18th of July, 1853, and was in the following terms:—

Thomas Mark Kerr hereby agrees to sell, and *John Falshaw Pawson* hereby agrees to purchase, "so soon as the same have become freehold under the covenant hereinafter contained, all that messuage or tenement situate at *Mill Hill* aforesaid, and known by the name of *Little Berries*, together with the lodges and buildings, garden and pleasure ground, with the meadow and pasture land therewith held, as the same are now in the occupation of *John Falshaw Pawson*, as tenant, to

Thomas

Thomas Mark Kerr, with all fixtures to the said messuage and buildings belonging, together with all timber and other trees, and all appurtenances to the same hereditaments belonging, at or for the price or sum of 8,100*l*." And *Thomas Mark Kerr* doth hereby agree with *John Falshaw Pawson*, that he *Thomas Mark Kerr* "shall and will forthwith apply to the lord of the manor of *Hendon* aforesaid, of which manor the hereditaments hereby agreed to be sold are held, and use his and their best endeavours, at his and their own proper costs and charges, to enfranchise the same, and so soon as the said enfranchisement shall be perfected, make out and deliver to *John Falshaw Pawson* an abstract of the title of him *Thomas Mark Kerr* to the said messuage, lands and hereditaments, shewing and declaring a good and marketable title thereto, and also shall and will make and execute, and cause and procure all other necessary parties to join in making and executing, proper conveyances and assurances to *John Falshaw Pawson*, his heirs and assigns, as he or they shall direct, subject to the approval of *Thomas Mark Kerr*, of the inheritance in fee simple of the said messuage, lands and hereditaments, when so enfranchised."

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The contract provided, that in case *Kerr* failed to succeed in accomplishing the enfranchisement, then the agreement should cease and be of none effect.

The Plaintiff proceeded to compel the lord of the manor to enfranchise, according to the provisions of the Copyhold Act, 1852, and for that purpose, he, on the 30th of *May*, 1854, was duly admitted tenant to the copyhold premises, and in the month of *August*, 1854, gave notice to Mr. *Dendy*, as lord of the manor, of his desire that the copyholds should be enfranchised;
and

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and in conformity with the provisions of the act, and under the direction of the copyhold commissioners, the consideration to be paid to the lord for such enfranchisement was ascertained to be the sum of 1,377*l.* 14*s.* 2*d.* Mr. *Dendy* or his steward having made the declaration required by the 22nd section of the act, the copyhold commissioners (it was alleged), in pursuance of the act, duly approved of the title of Mr. *Dendy*, as lord of the manor for the purposes of the act.

By an indenture dated the 19th of *November*, 1856, and made between Mr. *Dendy*, therein described as lord of the manor of *Hendon*, of the one part, and the Plaintiff of the other part, Mr. *Dendy*, with the consent of the copyhold commissioners, "granted, conveyed, enfranchised and released" the copyhold premises in question to the Plaintiff and his heirs, to hold discharged from all "fines, heriots, reliefs, quit-rents, fealty, suit of court, amerciaments, forfeitures, and all other customary payments, duties and services and incidents whatever of copyhold or customary tenure." With a proviso, that the deed should not prejudice Mr. *Dendy's* rights, in respect of "any of the rights reserved by the Copyhold Act, 1852, section 48."

Antecedent to the date of the agreement, and at the time of the enfranchisement, Mr. *Dendy* claimed to be, and acted as, the lord of the said manor of *Hendon*, and by his steward held courts, accepted surrenders, and granted admissions of and to copyhold or customary hereditaments within and held of the manor.

The purchaser's solicitor required the Plaintiff to produce and verify an abstract of Mr. *Dendy's* title as lord to the manor, and objected that the Plaintiff's title was incomplete without such production and verification;

cation ; but the lord refused to furnish such abstract or to produce his title deeds.

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The Plaintiff, in *March*, 1857, filed this bill for specific performance, insisting, that having regard to the terms of the agreement and to the provisions of the Copyhold Act, 1852, the Plaintiff was not bound and ought not to be compelled to produce or verify the title of the lord to the manor.

At the hearing, the usual reference was made as to the title.

The chief clerk having found that a good title could be made, the Defendant took out a summons to vary the certificate, by finding that the Plaintiff had not shewn and could not make a good title, for the following reasons :—

“ I. That the Plaintiff has not produced or verified an abstract, commencing at a proper period, of the title of Mr. *Dendy*, in the bill alleged to be the lord of the manor of *Hendon*, of which the premises alleged to be enfranchised were held.”

“ II. That the Plaintiff has not shewn himself to be in a position to procure for the Defendant a covenant for the production of the title deeds under which the manor is held.”

“ III. That the enfranchisement deed, which has been obtained from Mr. *Dendy*, contains a proviso, reserving to him the rights reserved by the Copyhold Act, 1852; and the Plaintiff has not shewn himself to be in a position to convey or procure a conveyance of the premises to the Defendant in fee simple, free from all reservations,

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July, 1853."

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Mr. *Hemming* for the purchaser; *Stapleton v. Crofts* (a); *Barbat v. Allen* (b).

Mr. *Selwyn* and Mr. *Freeling* for the vendor; *Monro v. Taylor* (c); *Walker v. Bentley* (d); *Jortin v. The South Eastern Railway Company* (e).

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

March 30. The question on this adjourned summons is, whether a good title can be shewn to certain copyhold hereditaments agreed to be sold by the Plaintiff to the Defendant, by a contract bearing date the 18th of *July, 1853*. This depends on two questions; the first is, whether the enfranchisement of the copyhold under the statute of 15 & 16 *Vict. c. 51*, will be valid and effectual to bar the rights of the lord, if the person against whom the copyholds were enfranchised be not, really, the lord of the manor, and had, in fact, no title to the lordship of the manor. In other words, the first question is, whether the title of the lord ought to be proved.

The second question is, whether under this contract the enfranchisement is good, although the title of the lord to the minerals is not vested in the tenant of the enfranchised lands.

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(a) 18 *Q. B. Rep.* 367.
 (b) 7 *Exch. Rep.* 609.

(c) 2 *Smale & G.* 48; 6
Ger. M. & G. 270, and 6 *Hc*
of Lords Ca. 425.

The first question depends on the construction of the act of the 15 & 16 *Vict.* c. 51, the second act for the enfranchisement of copyholds, viz.—that which provides for their compulsory enfranchisement. It is to be observed (and it is an argument much insisted on on behalf of the purchaser), that a great distinction exists between the first act, viz. 4 & 5 *Vict.* c. 35, by which an enfranchisement may be made by voluntary arrangement between the copyholder and the lord, and the second act, which enables either the lord or the copyholder to compel the enfranchisement of the copyhold tenement. By the first act the commissioners are enabled and, indeed, in some sense, it may be said, are required, to call for the title of the lord. The 43rd section gives them full power for this purpose. By that section (a) it is enacted that the commissioners shall have power “to require the attendance of all such persons as they or he may think fit to examine upon any matter brought before them or him, or respecting which they or he have or hath power to act as hereinafter mentioned, relating to any such commutation as aforesaid, or to any enfranchisement in pursuance of the provision hereinafter contained, and also make any inquiry and call for any answers or return as to such matter, and also administer oaths and examine all such persons upon oath, and cause to be produced before them or him, upon oath, all deeds, documents and writings, books, court rolls, rentals, contracts, agreements, accounts, writings, papers, maps, plans and surveys, or copies thereof respectively, in anywise relating to any such matter: provided always, that no such person shall be required, in obedience to any such summons to travel more than ten miles from the place of his abode to give evidence or produce any deeds, papers or writings relating to the title of any lands, unless such production

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(a) *Sect.* 43.



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production shall appear to the said commissioners or assistant commissioner essentially requisite in making the inquiries to be made under this act." Whereas the fifth section of the second act, which is the corresponding clause, enacts, "by way of proviso, "that no lord or tenant shall be bound to answer any question as to his title."

So also the 102nd section of the first-mentioned act enacts, that "the words *lord*" and steward "shall include the person or persons for the time being filling those respective characters or acting in those respective capacities, whether those persons shall be rightfully or lawfully entitled to fill such characters or act in such capacities or not." Under the word "lord" therefore is included a person who acts as lord, whether he is entitled to act as lord or not. But the fifty-second section of the second act, which is the corresponding section, expressly omits this, and briefly enacts, that "the word '*lord*' shall extend to" and include the lord or lords of any manor, whether seised for life or in tail or in fee simple, and all ecclesiastical lords seised in right of the church or otherwise, and lords farmers holding under them, and any body politic, corporate or collegiate, and all lords seised of any manor, whether they have or have not an absolute power of selling or disposing of the same, and the word steward shall extend to and include a deputy-steward or clerk acting as such for the time being." It is to be observed, that in the second act, the words which I have read from the 102nd section of the first act, namely, "whether those persons shall be rightfully or lawfully entitled to fill such characters or to act in such capacities or not," are carefully and expressly omitted.

The eleventh section of the second act specifies how
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the enfranchisements are to be made and from what period they are to take effect. The clause is in these words:—"Any enfranchisement of lands under this act or the said recited act shall be by deeds according to the form in the first schedule to this act annexed, or as near thereto as the circumstances of the case will admit, or by deed in any other form which the parties, with the consent of the commissioners, may think fit, and which deed the lord shall be bound to execute within twenty-eight days after the same shall be approved of by the commissioners, on the same being tendered to him for that purpose, and all enfranchisements so made shall take effect from the time of the execution of such deed by the lord but not before, and shall be effectual to vest the land thereby conveyed in the tenant or other person to whom the lands shall be conveyed, free from any estates, rights, titles to dower and free bench interests, incumbrances, claims or demands affecting the manor of which the same lands are holden: Provided always that in the meantime and until such enfranchisement shall so take effect, all the rights, remedies, powers, privileges and conditions of and affecting the lord and tenant respectively, in regard to such lands, with all the incidents of tenure, shall remain and continue unaffected."

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Therefore the enfranchisement is only to take effect from the time of the execution of such deed by the lord, that is, by the lord as defined by the interpretation clause, namely, a person having a freehold interest in the manor; but if the person who acts as lord has no title, he is for this purpose a mere stranger and the enfranchisement has no operation at all. This is certainly a very powerful argument when combined with the circumstances I have already adverted to, viz:—that the first act applies to persons acting as lord without

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being such, and requires their title to be investigated, while the second omits that provision and expressly prohibits the commissioners from investigating his title, so far as his evidence is concerned. And even where he applies for the enfranchisement, it is not necessary for him to prove his title, but he is entitled, by the twenty-second section (*a*), to make a voluntary declaration, which is to be sufficient for the commissioners to act upon. The clause is enabling and not compulsory and was introduced to meet the cases where the enfranchisement is sought against the copyholder. It says "previous to any enfranchisement under this act, it shall be lawful for the lord and steward, if they shall see fit, and if there shall be no steward then for the lord alone, to make a solemn declaration in such form as the said commissioners shall direct, and to be taken and subscribed as solemn declarations are by an act made and passed in a session held in the fifth and sixth years of his late Majesty King *William* the 4th, c. 62, directed to be taken and subscribed, stating therein the nature and extent of the estate and interest of the lord in the manor of which he is such lord and the date and short particulars of the deed, will or other instrument under which he claims or derives title, and the name and style or other designation or description of the person in whose name the court of any such manor was then last holden, and the date or time of the holding of such court and the incumbrances, if any, whether by mortgage, judgment or otherwise which affect such manor; and it shall be lawful for the said commissioners, and they are hereby directed, to approve of such title for the purposes of this act, which approval shall be testified under their hands and seal upon such evidence alone, unless they shall be of opinion that further information is necessary in the respects aforesaid; but if the said commissioners

(a) 15 & 16 Vict. c. 51, s. 22.

missioners shall consider that such evidence does not fully and truly disclose all such particulars as are necessary, or if no such declaration shall be made, or if the lord shall refuse or decline or fail to give such information and evidence as they shall deem proper and necessary to shew a satisfactory *prima facie* title in the lord or in persons claiming under or in trust for him, and if the said commissioners shall consider either that the title of the lord is not satisfactory or that the incumbrances should be produced, then, if they think the justice of the case requires it, they may direct that the enfranchisement consideration shall be invested as hereinafter directed in case of lords under disability."

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In case the lord applies for an enfranchisement, the 23rd clause applies, and the tenant may then require the commissioners to satisfy themselves as to the lord's title.

If the matter rested here, it would be difficult to hold that the enfranchisement was effectual against all persons who might have a title to the manor, but who were not, at that time, in the slightest degree represented by the enfranchisement proceedings approved of by the commissioners.

But a further examination of the other clauses, and of the general scope of the act, leads me to a different conclusion. First of all is the 33rd section (a), which is in these words, "The confirmation under the hands and seal of the commissioners of any award, or the execution by the commissioners of any deed or instrument whereby any enfranchisement shall be effected under the said acts or act, shall be conclusive evidence that all the directions in relation to the enfranchisement

(a) 15 & 16 Vict. c. 51, s. 33.

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ment intended to be effected by means of such award, deed or instrument, which ought respectively to have been obeyed or performed previously to such confirmation or execution respectively, have been obeyed and performed; and no such award, deed or instrument shall be impeached by reason of any omission, mistake or informality therein, or in any proceeding relating thereunto or on account of any want of any notices or consents required by the said acts or this act, or on account of any defects or omissions in any previous proceedings whatever in the matter of such enfranchisement."

I think it is impossible to get over this clause,—the confirmation is to be conclusive evidence that all the directions which ought to have been performed have been performed: the deed of enfranchisement ought to have been executed by the lord of the manor, therefore, the confirmation of the commissioners is conclusive evidence that it has been so executed. Again, no such award or deed is to be impeached by reason of any omission or defect in any previous proceedings whatever in the matter of such enfranchisement. This cannot be got over, because it is not to be impeached by reason of any defect or omission, and it is clearly a defect or omission that the lord has not executed it, and the confirmation of the commissioners is to cure that defect and omission. The 33rd section, therefore, seems to me expressly to direct, that notwithstanding any person shall not have executed, or even if no person at all has executed, still, if the commissioners think fit to approve of what has been done, it is binding on everybody.

The 34th section is also confirmatory of this: it is, that after the confirmation of the apportionment and  
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final enfranchisement the tenure is to alter, and it is to go according to freehold tenure.

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The rest of the act and the scope of it, which is to make a complete and effectual enfranchisement, leads to the same conclusion. The 47th section is clear as to this: it refers to the cases of defective titles of lords and tenants, and provides "That if any enfranchisement consideration money shall be paid to any lord whose title shall thereafter prove to be bad or insufficient, the rightful owner of the manor or his representatives shall be entitled to recover, against such lord or his representatives, the amount or value of such consideration money as money had and received to the use of such rightful owner, and interest thereon at the rate of 5*l.* per cent. per annum from the time of such title so proving to be bad or insufficient; and that if any tenant or person claiming to be tenant shall, after payment by him of any enfranchisement consideration money, be evicted from the lands enfranchised by an adverse claimant, such tenant or person shall be entitled to claim the repayment of such consideration money against the lands enfranchised, and the amount thereof shall be a charge upon the lands enfranchised and shall carry interest at the rate of 4*l.* per cent. per annum from the time of such eviction."

The latter part of this clause as to a tenant is clear that the defect in title in the copyholder does not affect the validity of the enfranchisement, why should it in the case of defect in title in the lord? The remedy is by action for the amount paid, with interest at 5*l.* per cent. I admit that he may be insolvent or bankrupt and that the remedy may be worth little or nothing, but on the other hand, unless the enfranchisement *bond fide* effected (because fraud no doubt would vitiate everything

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everything as against the person guilty of that fraud) were perpetual and valid against everyone, the act would be worth nothing and the title of the lord as well as of the copyholder must be examined on every subsequent occasion. The legislature thought that the risk of insolvency of the lord was not sufficient to counterbalance the advantage to be derived from this act, and accordingly thought fit to make it compulsory. I am of opinion that the whole scope and object of this second act, as it clearly was of the first act, is to make a perfect and binding enfranchisement, although the lord might have no title to the manor at the time he made it.

With respect to the second question, I think that the agreement must be considered with reference to the provisions in the acts on this subject.

The question is, whether the agreement must be understood to include the minerals as well as the whole surface ground. The agreement is, that the vendor shall use his best endeavours to enfranchise the copyhold, and as soon as the enfranchisement shall be perfected to make out and deliver to the purchaser an abstract of title shewing a good title. Then he is to execute and procure all proper parties to execute a conveyance of the inheritance in fee simple of the said messuage, lands and hereditaments when so enfranchised. There is certainly nothing whatever said about minerals, and *primâ facie* an agreement to convey lands in fee simple would include the minerals.

But I observe these provisions in both acts :—By the 82nd section of the first act it is provided “ That no commutation under this act shall operate to affect any rights of lords of manors to escheats, fairs, markets, appointments,

pointments, franchises, royalties, rights, liberties and privileges of chase and free warren, hunting, hawking, fowling, and of chasing and killing game and beasts of chase and free warren, and of all ancient piscaries, fisheries and rights of fishing, or any rights in any mines and minerals or quarries within or under the said lands and hereditaments or any other manorial rights whatever, unless expressly commuted under this act."

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The corresponding section in the second act, which is the 48th, provides that "No enfranchisement under this act shall extend to or affect the estate or rights of any lord or tenant in or to any mines, minerals, limestone, lime, clay, stone, gravel, pits or quarries within or under the lands enfranchised or within or under any other lands, or any rights of entry, rights of way and search, or other easements of any lord or tenant in, upon, through, over or under any lands, or any powers which in respect of property in the soil might, but for such enfranchisement, have been exercised for the purpose of enabling the said lord or tenant, their or his agents, workmen, or assistants, more effectually to search for, win and work any mines, minerals, pits or quarries, or to remove and carry away any minerals, limestone, lime, stones, clay, gravel or other substances had or gotten therefrom, or the rights, franchises, royalties or privileges of any lord in respect of any fairs, markets, rights of chase or warren, piscaries or other rights of hunting, shooting, fishing, fowling" and the like, which are specified in the 82nd clause of the former act. The difference between the two acts being, that under the first act the enfranchisement is not to affect those rights of the lord "unless expressly commuted," and under the second they are not to be made the subject of any commutation at all, and are not affected in the slightest degree.

I think

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I think that the persons who entered into this agreement must, at the time when it was executed, have had reference to these acts; and I assume, which is the most favourable way of putting it, that they had reference to the first act only, under which the rights of free chase and warren and the right to minerals might have been made the subject of commutation: but then having reference to that Act of Parliament, they both of them knew, that minerals could only be included if they were made the subject of express stipulation. I think therefore, that unless minerals were made the subject of express stipulation, this agreement must bear the same construction which an ordinary enfranchisement would have obtained under the first permissive or voluntary act, namely, that unless specified, it was not to affect the right to minerals, inasmuch as the parties themselves understood that it could not affect those rights unless stated.

I think that I must construe the agreement as I should an enfranchisement under the first act, viz. that it does not include minerals and was not intended to do so, unless specially named and mentioned: the consequence is, that, in my opinion, both points must be decided in favour of the Plaintiff, and the certificate of the chief clerk must be confirmed.

NOTE.—See the subsequent act of the 21 & 22 Vict. c. 94.

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CAMBRIDGE v. ROUS.

THE question, in this case, arose upon the construction of the wills of *Martha K. Van Mierop*, and of her aunt *Sarah M. K. Van Mierop* (a).

Martha's will was dated in 1790, and thereby, after giving several pecuniary legacies, she gave to trustees all the remainder of her property in trust to invest and pay the yearly dividends to her sister, Mrs. *Cornelia Cambridge* for life, "and from and after her decease, to divide the same equally between my said sister's children, when they should severally and respectively have attained the age of twenty-seven years, the share of such as shall die under that age to go to the survivors, in the same manner as his or her original share, the dividends or any portion thereof, at the discretion of my executors, or the survivor or survivors of them, to be employed in the education of such children."

"In the event of the death of my sister *Cornelia Cambridge* not leaving any child or children at the time of her death, or the death of all her children under the age of twenty-seven years," I give and bequeath the whole to my cousins, *Thomas Bates Rous*, *George Rous*, *Robert Rous*, esquires, *Mary Rous*, *Anna Maria Peter*, *Thomas Bentham* and *Elizabeth Bentham*, equally to be divided share and share alike, the share of each who shall happen to die to be equally divided

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(a) 8 Ves. 12.

dren should inherit the share of the parent." The seven all died before the tenant for life, *A. M. P.* being the survivor of them. Held, first, that the seven took equally, secondly, that the children of *A. M. P.* took no more than one-seventh, and thirdly, that the share of one of the seven who predeceased the testatrix was undisposed of.

Ap. 16, 27, 28.

Effect given to a gift over in one of two alternatives which happened, though the other was too remote.

Bequest to trustees for *A.* for life, and after her decease to divide between her children when they should attain twenty-seven, and in the event of *A.* not leaving any child at her death, then over. *A.* had no issue. Held, that the gift over took effect.

Gift to *A.* for life, and afterwards to seven named persons, equally, "the share of each who shall happen to die to be equally divided amongst the survivors, unless *A. M. P.* [one of them] should die leaving children, in that case, I mean that her chil-

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among the survivors, unless my said cousin *Anna Maria Peter* should die leaving child or children, in that case I mean that her child or children *should inherit the share of the parent so dying.*"

Sarah Maria Knych Van Mierop, the aunt, made her will, dated in 1798, whereby, in the event which happened, she gave her residue in a similar manner.

Martha died in *March*, 1799, *Sarah* the aunt survived and died in *April*, 1799, and *Cornelia Cambridge* lived until 1858, when she died without having had any issue.

As to the seven cousins, *Thomas Bates Rous* died in *January*, 1799, in the life of both the testatrixes, the other six died in the life of *Cornelia Cambridge*. *Anna Maria Peter* was the survivor of them, and she died in 1832 leaving children.

In this suit, the residue of both estates had been ascertained and invested, and the income paid to Mrs. *Cornelia Cambridge* during her life. Upon her death in 1858, the funds became divisible.

This was a petition presented by the representatives of *George* and *Robert* for payment of the fund, and the question raised was as to the proper construction of the will.

Mr. *R. Palmer* and Mr. *Pemberton* in support of the petition. Though the gift over on the death of all the children of *Cornelia Cambridge* under twenty-seven is too remote, yet the gift on her death "not leaving any child" is perfectly valid. The bequest to the seven cousins was to take effect in the event of either of two contingencies, one of which is valid and has occurred, the Court will therefore give effect to it, though the
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other contingency may be too remote. *Longhead v. Phelps* (a); *Monypenny v. Dering* (b); *Minter v. Wraith* (c).

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Secondly, there is, in the first instance, an absolute gift with a right of survivorship, which has reference to the death of the tenant for life. None have survived, and therefore the first absolute gift remains undisturbed and takes effect; *Harrison v. Foreman* (d); *Sturges v. Pearson* (e); *Williams v. Tarrt* (f); *Eaton v. Barker* (g); *Roberts v. Burder* (h); *Wagstaff v. Crosby* (i); *Littlejohns v. Household* (k); *Antrobus v. Hodgson* (l); *Browne v. Lord Kenyon and Others* (m); and see *Page v. May* (n).

Mr. *Greene*, for the executor of *Cornelia Cambridge*, did not argue the question of remoteness, but he contended that the survivorship was to be ascertained at the period of division; *Cripps v. Woolcott* (o); *Hearn v. Baker* (p); *Carver v. Burgess* (q); *Browne v. Lord Kenyon* (r).

Mr. *Bush* for *Domville*, the executor of the last surviving executor of *Elizabeth Bentham*.

Mr. *Follett* and Mr. *Osborne* for children of *Anna Maria Peter*. The will of *Martha* contains a clause, substituting the children of *Anna Maria Peter* in her place for "her share." Then what was her share? she survived the whole class, and therefore "her share" consisted,

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| (s) 2 <i>Wm. Black</i> . 704. | (i) 2 <i>Colly</i> , 746. |
| (b) 7 <i>Hare</i> , 595, and 2 <i>De G.</i> ,
<i>M. & G.</i> 145. | (k) 21 <i>Beav.</i> 29. |
| (c) 13 <i>Simons</i> , 52. | (l) 16 <i>Sim.</i> 450. |
| (d) 5 <i>Ves.</i> 207. | (m) 3 <i>Mad.</i> 410. |
| (e) 4 <i>Madd.</i> 411. | (n) 24 <i>Beav.</i> 323. |
| (f) 2 <i>Colly</i> , 85. | (o) 4 <i>Mad.</i> 14. |
| (g) <i>Ibid.</i> 124. | (p) 2 <i>Kay & J.</i> 383. |
| (h) <i>Ibid.</i> 130. | (q) 7 <i>De Ges.</i> , <i>M. & G.</i> 96. |
| | (r) 3 <i>Mad.</i> 410. |

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consisted, by survivorship, of the whole funds. According to modern authorities, it must be admitted, that the case of *Cripps v. Woolcott* (a) furnishes the rule, that survivorship after a life estate has reference to the decease of the tenant for life; but this case does not fall within the principle. In *Cripps v. Woolcott* there was a life estate, followed by a vested remainder, with a clause of survivorship. *Harrison v. Foreman* (b) decides, that if a clause divesting a vested interest does not take effect, the vested interest remains, but here the substituted gift does take effect. If Mrs. Peter had survived the tenant for life, she would undoubtedly have taken the whole, her children stand in her place, and they did survive *Cornelia*; *Ive v. King* (c). They also cited *Ashling v. Knowles* (d).

Mr. Lloyd and Mr. Southgate for another child of *Anna Maria Peter*. The last survivor of the cousins took the whole, she was the only person fulfilling the condition of surviving. In *Harrison v. Foreman* (b), the words of survivorship were "living at her" (the tenant for life) decease, and in *Sturgess v. Pearson* (e), the words were "such of them as shall be living at her decease." This was a personal condition, which was not complied with.

2. The survivorship only applies to the original and not to the accrued share; *Douglas v. Andrews* (f); *Jarman on Wills* (g); *Workidge v. Churchill* (h).

3. As to *Thomas's* share, they cited *Walker v. Main* (i); *Jarman on Wills* (k), to shew, that though
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(a) 4 *Mad.* 14.
 (b) 5 *Ves.* 207.
 (c) 16 *Beav.* 54.
 (d) 3 *Drew.* 593.
 (e) 4 *Mad.* 411.

(f) 14 *Beav.* 247.
 (g) *Vol.* 2, p. 582.
 (h) 3 *Bro. C. C.* 465.
 (i) 1 *Jac. & W.* 1.
 (k) *Vol.* 2, p. 536.

he died in the life of the testatrix, the ulterior gift took effect.

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Mr. C. Herbert Smith for the executor of *Anna Maria Peter*.

Mr. R. Palmer in reply. The word "unless" is an exception from the clause of survivorship, and the clause refers to the one-seventh share of the parent, i. e. Mrs. Peter.

The MASTER of the ROLLS. I will look at the cases before deciding.

The MASTER of the ROLLS.

The question which arises in this case is on the construction of the two wills of *Martha* and *Sarah Knyeh Van Microp*.

April 27.

Martha's will made in 1790 was to this effect—[See ante, page 409.]

Sarah made her will in 1798. She gave her property in like manner to her niece *Cornelia Cambridge* for her life, and at her decease to her children; and in default of such children, or if they all died under twenty-one, then to her niece *Martha* absolutely if alive, if not, "to the same persons that her niece *Martha* might have disposed of her own property by any will or testament she may have left."

Sarah died in April, 1799, and *Martha* died in May following, *Cornelia Cambridge* died in January, 1858, without ever having had any children, so that the gift
over

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over took effect, and the question is who are the persons entitled under the gift over contained in the will of *Martha*, which I have already read.

The first question is, whether the gift over is too remote, and there can be no doubt, that if the gift over had rested on the latter branch of the alternative, and had been limited to take effect only on the death of the children under twenty-seven, it would have failed. But as, in the present case, the other branch of the alternative, the event on which the limitation is to take effect, is perfectly good, it is settled, by repeated authority, that it will not fail, and accordingly this point has been scarcely contested before me, and this gift over therefore, in the events which happened, took effect.

The words are, in the event of the death of Mrs. *Cambridge* not having any child or children at the time of her decease, I give the whole to my cousins *Thomas Bates Rous, George Rous, Robert Rous, Mary Rous, Anna Maria Peter, Thomas Bentham* and *Elizabeth Bentham*.

Thomas Bates Rous died in 1799, in the life of the testatrix. *George Rous* died in 1802. *Robert Rous* died in 1806. *Mary Rous* died in 1807. *Anna Maria Peter* died in 1832. *Thomas Bentham* died 1803; and *Elizabeth Bentham* died in the same year.

If it were not for the limitation to the survivors on the death of each, it would be reasonably clear, that the representatives of the legatees would have taken the shares so given in sevenths.

The children of Mrs. *Peter* claim the whole fi under the gift over. They insist, that the word :

vivor means only survivor *inter se*, and not those surviving the tenant for life, and that as Mrs. *Peter*, who died in 1832, survived all the other cousins, still, although she did not survive the tenant for life, yet by the words of the gift, she took both the original and accrued share of the two cousins.

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If they fail in this, which in truth is not the point on which they principally rely, they contend, that the direction contained in the will, that the children of Mrs. *Peter* "shall inherit the share of the parent," puts them in the place of Mrs. *Peter*, and that, consequently, they, having survived the tenant for life, must be treated as the survivors and entitled to the share of all the cousins who predeceased her.

With respect to the first argument, that construction is, in my opinion, inconsistent with the authorities on the subject: it does not point to any period to which the survivorship is to be referred, but simply assumes that the last survivor is to take the whole: in fact, it would simply be this:—if they all died before the fund was distributable the last survivor would take, which really is a gift of property in joint tenancy: but this is inconsistent with the words of the will, and it would also be at variance with the whole course of authorities, which point out, that the only duty of the Court is to determine to what period the word *survivor* or *survivorship* relates; and one cannot get over the difficulty by giving it amongst them as joint tenants. The question really is, to what period the survivorship points, and I think that it is now settled, that the survivorship must be referable to the time of distribution. *Cripps v. Wolcott* has so decided and I have always followed it.

The period of distribution here is the death of Mrs.
Cambridge,

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Cambridge, and I think that the survivorship points to that period.

The second and most important question raised by the Respondent is, whether the children of *Mrs. Peter* are entitled to the same benefit as if *Mrs. Peter* had herself survived the tenant for life. The words of the will are, "that her children shall inherit the share of the parent," that is, although she died before the period of distribution. The "share" of each who should happen to die was to be equally divided among the survivors, but the share which *Mrs. Peter* would have taken if she had survived the tenant for life, is to go to her children. The view I take of this clause is, that same meaning is to be given to the word "*share*," when applied to the others who died, as to the "*share*" given over to her children. In my view of the real meaning of this clause, the word "share" is synonymous with seventh. If one died before the tenant for life, his one-seventh is to go to those who survived her, unless *Mrs. Peter* should happen to die leaving children, in which case her one-seventh is to go to her children.

Although this is in my opinion the real meaning of the words used by the testatrix, it may, however, be, that I may be bound by authority, which may have placed a different meaning to the words. Notwithstanding the obvious and frequently pointed out inconvenience of construing one man's meaning by another man's meaning, still it is an obvious rule of convenience, that settled rules should not be shaken, and better even that, in a particular case, the intention of the testator should be defeated.

The

The only case cited to me as an authority for this construction is the case of *Le Jeune v. Le Jeune* (a).

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In my opinion, that case lays down no such proposition. The marginal note would seem to bear the construction, because it is this (a):—"Bequest of copyhold and leasehold property to the testator's widow for life, and at her death the whole to be sold and divided into five parts, one of which was to be paid to each of the testator's four sons living at her decease, and in case of either of their deaths, his share to be paid to his issue, and in case either should die without issue, his share to be divided amongst the surviving children. Held, that the child of a son who died in the testator's life was entitled to such share as her parent, if he had survived the widow, would have been entitled to." But when the facts of that case are looked at, it does not decide the point or govern the case now before me.

There being no authority, and that not being the construction, I am of opinion they can only take a share similar and equivalent to the shares of the others, in fact, the share which would have gone to the mother.

The fact is, that all the cousins died before the tenant for life, and as there is no gift over in case of the death of all during that time, I am of opinion that they all take, the event on which alone their interests were to become divested not having occurred. The only doubt could arise on the share of *Thomas Bates Rous*, who died before the testatrix in 1799. I think that under the principle which I followed in *Ive v. King* (b), the interest given to him by the testatrix would

(a) 2 Keen, 701.

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(b) 16 Beav. 46.

B B

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would pass to the persons to whom it was given over, if there had been any one to take, but as, in my opinion, there is no gift over which takes effect, this must be treated, in the events which have occurred, as a gift to him absolutely, and consequently, as he died in the lifetime of the testatrix, his share lapsed.

29 April.

GIESLER v. JONES.

A testator gave all his personal estate to his wife for life, and he bequeathed 40*l.* to A. B., and other pecuniary legacies, all of which were payable at her death. By a first codicil, he gave a legacy of 200*l.* to C. D. (who was not mentioned in his will), and he directed that all things in his codicil should be performed as if the same were so declared in his will. By another codicil, he revoked the legacy of 40*l.* to A. B. and gave her 50*l.* Held, that the legacy of 200*l.* was payable at the death of the testator, but that the payment of the legacy of 50*l.* was postponed until the death of the widow.

THE testator by his will, dated in 1841, gave "all" his personal estate "whatsoever" to his wife for life, and after her demise, the personal property to become subject to the following bequests, to be paid at the expiration of twelve months after his decease and his wife's, viz. :—[*Here specifying a number of pecuniary legacies, and amongst them 40*l.* to his cousin and god-daughter Harriet Wynne.*]

By a codicil, dated in 1843, the testator confirmed and ratified his will, and after giving and bequeathing unto his god-son and nephew *Henry Jones Lloyd* the "sum of 200*l.*," he proceeded thus :—"And my will and meaning is, that this codicil or schedule be and be adjudged to be part and parcel of my said will and testament, and that all things contained and mentioned be faithfully performed in as full and ample a manner in every respect as if the same were so declared and set down in my said will.

By another codicil, dated in 1847, the testator expressed

pressed himself thus :—" And whereas I have by my said will given and bequeathed unto my cousin and god-daughter *Harriet Wynne* the sum or legacy of 40*l.*, now I do hereby revoke the said legacy so given to the said *Harriet Wynne*, and I give to the said *Harriet Wynne* the sum of 50*l.*"

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The testator died in 1851.

The chief clerk found that interest was payable on the two legacies of 200*l.* and 50*l.* from the end of one year after the testator's death, and he calculated the same accordingly.

A motion was now made to vary the certificate.

Mr. *Palmer* and Mr. *Amphlett* for the motion.

Mr. *Lloyd* and Mr. *Simpson* *contrà*.

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I have no doubt as to the true construction of the will. With respect to the legacy of 200*l.*, I think there is a distinct and absolute bequest of 200*l.* to a person of the name of *Henry Jones Lloyd*. The testator makes a codicil by which he confirms his will, and he says, I give *Henry Jones Lloyd* "the sum of 200*l.*" That is an absolute pecuniary legacy, to be paid in the first instance out of personal estate.

It is true that he says, the codicil is to be adjudged to be part of his will, and that all things therein contained are to be performed "as if the same were so declared and set down in his said will." Mr. *Lloyd* says, that

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to comply with this direction, the bequest must be introduced into the will, and that if it be, it must be placed with the other bequests, the payments of which are postponed till after the decease of the wife. But this does not in my opinion follow. If you place the bequest after the clause "to be paid at the expiration of twelve months after my decease and my wife's," it would be subject to the same stipulations; but if you place it elsewhere, it would be an absolute present legacy. But in truth, these words do not, in my opinion, mean anything more than that the codicil is to be of equal force with the will, but to supersede nothing contained in it.

I think I must treat this as a common and ordinary legacy of 200*l.* payable at the testator's death.

The case is very different as regards the 50*l.* The testator, in his codicil, recites that he has given a legacy of 40*l.* to *Harriet Wynne*; this he revokes and gives her 50*l.* I think this is the same as if he had substituted a legacy of 50*l.* for that of 40*l.* and made it subject to all the conditions and stipulations of his will, one of which was, that it should not be paid till the expiration of twelve months after the decease of his wife.

The chief clerk's certificate must be varied as to one of the legacies and confirmed as to the other.

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ON the 30th of *November*, 1820, *Orred, Lowe and Hurry* executed a deed, whereby they covenanted to become partners, as solicitors, for fifteen years. The deed contained, amongst other provisions, the following :—That if any of the parties should permit any part of his share of gains to remain “in and for the use of the concern,” he should be entitled to, and that the capital of the concern should be a security for, the same, and if insufficient, the other partners should, from their own separate estate, make good their proportions of the same, as far as, in equity, they or he ought to be chargeable.

That upon the death of either of the said parties, the partnership should as to him be dissolved, and his share and interest in the concern should devolve to and be divided by and between the survivors, &c.

That within six months after the determination of the co-partnership, or after the death of either of the parties during the continuance thereof, the parties or their representatives should meet together, and state, settle and adjust a final account in writing, of and concerning the joint funds, outstanding debts, receipts and payments, and of all the co-partnership transactions, and thereupon, or as soon as could possibly be done in the former event, distribution and division should be made of the partnership funds and effects, and in the latter event, the surviving partners or partner should forthwith pay or cause to be paid to the representatives of the deceased the share of such deceased partner of

Jan. 14, 15, 18, 19, 26.

Payments made by a receiver in a suit, but which were not authorized by the order appointing him, held not to take the case out of the Statute of Limitations.

In a suit by the executors of two deceased partners against the third, who survived, to take the accounts of the concern, a receiver was appointed, and ordered to pay the proceeds of the assets into Court.

Instead of this, he paid them over to one of the Plaintiffs, in part discharge of the debt due to their testator from the estate of the other deceased partner, upon the balance of the accounts as then estimated. Held, that such payment did not take such debt out of the Statute of Limitations.

and

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and in the partnership funds and effects, and should continue to carry on the business in manner hereinbefore provided.

In 1828, *Orred* died, and the Plaintiffs were his executors.

In 1834, *Lowe* died intestate, and Mrs. *Lowe*, the Defendant, was his administratrix.

A suit of *Whitley v. Hurry* was instituted by the representatives of *Orred* and *Lowe* against *Hurry* (the surviving partner), stating that he had relinquished his connection with the firm about the time of *Orred's* death, though there had not been an actual dissolution, and that nothing was due to him from the assets, and praying the usual account, and to wind up the concern and a receiver of the partnership assets. In that suit (*Whitley v. Hurry*) an order was made on the 12th of June, 1834, by consent, appointing Mr. *Dalrymple* receiver, to collect and get in the debts due to the partnership; and he was to pay his balances into Court to the credit of that cause.

Dalrymple had been in the service of the firm until *Lowe's* death, as cashier and book-keeper, and from the death of *Orred* until his own death, which occurred in 1863, *Dalrymple* acted as the general agent of *Orred's* executors at a fixed salary. After *Lowe's* death, *Dalrymple* collected the rents of certain houses at *Liverpool* as the agent of Mrs. *Lowe*, and it was one of the points of dispute in the case whether or not he was her general agent. She asserted that he was not, but that Mr. *North*, a solicitor at *Liverpool*, who purchased the goodwill of her husband's business from her, was her agent, and that *Dalrymple* acted for her only as his clerk.

After

After *Orred's* death, *Lowe* got in part of the outstanding debts of the firm and made numerous payments to *Orred's* executors.

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In the year 1835, *Dalrymple* made out and sent to Mrs. *Lowe* an account of her husband's estate, from which it appeared, that there was due to *Orred*, *Lowe* and *Hurry* for balance of cash received on their account by *James Lowe* after the dissolution of the partnership, 1,980*l.* And to such account was appended the following memorandum:—"The above is dependent upon the question as to the extent of the late *James Lowe's* liability to the late Mr. *Orred*, so far as respects the shares of the partnership property to the time of the death of Mr. *Orred*.

"Mr. *Orred* received nothing in his lifetime from the partnership. Mr. *Lowe* received about 4,400*l.*, and Mr. *Hurry* about 1,700*l.*; the interest of Mr. *Orred* under the articles of partnership being for the first five years four-fifths, and during the last two years eleven-twentieths of the whole profits. Mr. *Orred* and his executors advanced for partnership purposes and debts 6,518*l.*, which had been about repaid (without interest) by money collected on account of outstanding debts due to the concern at Mr. *Orred's* death. Of those debts there was 10,489*l.* outstanding at Mr. *Lowe's* death (principally on bills not made out) but of which not more than one-half will be realized."

In the year 1836, the debt of 1,980*l.* was discharged, partly by a bill of costs due from *Orred's* executors to the estate of *James Lowe*, and the residue by a cheque drawn by Mrs. *Lowe* in their favour, and paid through *Dalrymple*.

Dalrymple

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Dalrymple also paid all the moneys received by him from time to time from outstanding debts of the late firm of *Orred, Lowe and Hurry to Orred's* executors, and such payments were made continuously down to 1845.

After giving credit for such payments, the Plaintiffs claimed a considerable sum as being due to them from the estate of *James Lowe*, in respect of the balance of *Orred's* share of profits and interest.

Dalrymple and *North* were trustees for Mrs. *Lowe* of a mortgage representing moneys belonging to *Lowe's* estate; and in the year 1846, an arrangement was made between *Dalrymple* with the concurrence of the Defendant's son (who was then a minor, and an articulated clerk in the office of *North*, who was then acting as solicitor for the Plaintiffs and also for Mrs. *Lowe*), the Plaintiffs and Mr. *John Orred*, a son of *George Orred*, by which the mortgage was to be assigned to *Orred's* executors in satisfaction of their claim. This arrangement was communicated to Mrs. *Lowe* by *Dalrymple* in the year 1849, whereupon she wrote to the trustees, protesting against the same, and informing them that it had been made without her authority or knowledge.

Mr. *North* answered her letter, informing her that the arrangement was a beneficial one for her, and refusing to assist her to disturb it.

In 1852, she wrote to the same effect to the Plaintiffs, and they thereupon communicated with *Dalrymple*, and learning from him that the arrangement was being acted on, did not answer her letter.

Dalrymple

Dalrymple died in 1853, and Mrs. *Lowe* then employed a solicitor to investigate the matter, but took no step to claim the mortgage in question until 1856, when, having changed her solicitor, she instituted a suit of *Lowe v. North* to recover the mortgage moneys. To this suit *Orred's* executors were not parties, and in 1857, they, in consequence of such proceedings, instituted the present suit against Mrs. *Lowe* (as the representative of *Lowe*), *North* and *John Orred*, for a transfer of the mortgage, or in the alternative for a general account of the partnership transactions of *Orred, Lowe* and *Hurry*.

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Mr. *Selwyn* and Mr. *Kay* for the Plaintiffs. *Dalrymple* was agent of the Defendant, and the arrangement made by him in 1846 was binding upon her. If not, she says that *North* was her agent, and he acted through *Dalrymple* as his clerk, and moreover he expressly sanctioned and approved the arrangement. The Defendant knew of it in 1849, and never attempted to set it aside until 1856, when *Dalrymple* was dead, and twenty years had just elapsed since the last payment on account made by her. If the Defendant is not bound by what was done on her behalf with regard to the transfer of the mortgage, the Plaintiffs ought to be placed in the same position as they were at the time the arrangement was entered into, and she cannot now set it aside simply for the purpose of insisting that the debt for which it provided is barred by the statute.

But the Plaintiffs' claim is not barred:—1. Because it is a specialty debt under the covenant in the articles of partnership, and not a simple contract debt; and, 2. It has been kept alive by the payments on account made by *Dalrymple*, which payments were made by him

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him as the agent of the Defendant, and with her concurrence.

Mr. *R. Palmer*, Mr. *Follett* and Mr. *Locock Webb* for Mrs. *Lowe*. The arrangement was made without her authority, she has never acquiesced in what was done: on the contrary, she always protested against it. As to the second point, no acknowledgment of the claim has been made within the meaning of the 3 & 4 Will. 4, c. 42, and assuming it to be a specialty debt, it is barred by that statute. The payment made by Mrs. *Lowe* in 1836, discharged the debt appearing to be due by the account, and no payment has since been made to *Orred's* executors by Mrs. *Lowe* or by any one authorized on her behalf. The payments by *Dalrymple* to *Orred's* executors of the moneys collected by him, as receiver in the suit of *Whitley v. Hurry*, were made by him in his character of receiver, and not as the agent of Mrs. *Lowe*. Her authority for such payments had never been given or required. They cited *Barber v. Barber* (a); *Adams v. Barry* (b).

The MASTER of the ROLLS.

Jan. 18. The Plaintiffs have made out no case for the relief they ask.

The case is a simple one. In *November*, 1820, Mr. *Orred*, Mr. *Lowe* and Mr. *Hurry* entered into a partnership, which went on till *December*, 1828, when Mr. *Orred* died; *Lowe* then carried on the business till *January*, 1834, when he died. A considerable claim had been made by Mr. *Orred*, in his lifetime against Mr.

(a) 18 Ves. 285.

(b) 2 Collyer, 290.

Mr. *Lowe*, and considerable payments seem to have been made by Mr. *Lowe* on account of Mr. *Orred*, both in Mr. *Lowe's* lifetime and to his executors. Upon *Lowe's* death, an account ought to have been taken to ascertain the state of the partnership accounts and to have them settled and arranged; accordingly, the executors of *Orred* and Mrs. *Lowe* instituted a suit for the purpose of taking the partnership accounts and of excluding *Hurry* from having any control in the management of the business. In that suit a motion was made for a receiver. The motion was consented to, and by an order made on the 12th day of *June*, 1834, Mr. *Dalrymple* was appointed the receiver of the partnership assets of the firm of *Orred, Lowe* and *Hurry*, with directions to pay the amount of the sums received by him into Court. If the parties to this suit wanted to have the rights and claims of all persons clearly ascertained, they ought to have had all the partnership accounts taken, the assets paid into Court by the receiver, the amount due from all the various partners between one another ascertained and made good, and the assets divided according to their respective rights. That would have taken considerable time, but the assets would, in the meanwhile, have been recovered and retained in Court until the account had been finally taken, for this Court would not have allowed any partner to receive a penny (except by arrangement among themselves) until the accounts had been taken.

In the year 1835 a paper was sent to Mrs. *Lowe* to give her an account, as far as it could then be ascertained, of the state of her husband's affairs; this pointed to three different species of debts due from Mr. *Lowe's* estate to Mr. *Orred's* estate. One of these was the sum of 1,980*l.* which is said to have been personally due from Mr. *Lowe* to Mr. *Orred* for a balance of cash received on

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their account by *James Lowe* after the dissolution of the partnership, or which he was personally liable to pay.

Another claim was for the amount of interest on the capital advanced by Mr. *Orred* which had been repaid "or about repaid," and on which he was entitled to receive interest but which had not been paid. That is the sum of 6,518*l.*, which they say that Mr. *Orred* and his executors had advanced, which had been wholly or nearly repaid, but without interest, by moneys collected on account of outstanding debts due to the concern at *Orred's* death. That is the second claim.

The third claim was the amount due to Mr. *Orred* in respect of profits made by the concern which he had not received. These were the three classes of claim. The two latter are not taken into account in estimating Mr. *Lowe's* assets, but it is stated that the amount depends on them.

It is clear that this Court would not, at that time, have allowed any person to receive any portion of the assets that were to be got in belonging to the partnership, on the assumption that any amount was due from one partner to another, until the accounts had been taken. I have little doubt that this matter was managed in the manner most beneficial to all parties, it was so considered by Mr. *North* (the solicitor) who, I presume, had the conduct of the suit in *Whitley v. Hurry*, and the facts were probably communicated to Mrs. *Lowe*, for although there is no direct evidence on the subject, it is fair to assume that all this was in substance communicated to her; but whether the communication was distinctly made to her, or whether she offered any objection to it, there is no evidence. I must assume that this was the arrangement, viz., that Mr.

Dalrymple,

Dalrymple, the receiver (subject to the discharge of the costs of the suit and any outgoings) should pay all he received of the outstanding debts to *Orrred's* executors. If the suit of *Whitley v. Hurry* had gone regularly on and the accounts had been taken, *Orrred's* executors would have got nothing at that time, but the money would have been invested in Court.

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It may well be, that it was considered a much more beneficial arrangement that the money should be paid over to them than that the accounts should be taken between the partners. It is to be observed in the paper I have referred to it was anticipated that something like 5,000*l.* would be obtained from 10,489*l.* outstanding at Mr. *Lowe's* death, principally on bills not made out, but of which not more than one-half would be realized. It might reasonably be supposed by any person not acquainted with legal matters, that the sum of 5,000*l.* would be raised from that source.

Mrs. *Lowe* knew from the accounts that Mr. *Lowe* had received from these sources about 4,400*l.*, she knew also that the capital had to be repaid, that there was interest to be repaid, and she did not know from what source this fund might be produced. It was a perfectly fair and natural supposition, on her part, if she heard nothing about it within a reasonable time, that the receivership had produced sufficient to meet that amount.

The amount of 1,980*l.* was a separate matter, and it appears from the accounts that that sum was actually paid by her out of Mr. *Lowe's* assets in the year 1836.

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What reason had she to suppose that there was any further claim to be brought forward ?

Was it fair on their part to say to her, we will receive everything that is to be received, but if that does not satisfy us and produce as much as we are entitled to, we will have an account taken afterwards ? That would be giving to Mr. *Orred's* executors all the possible advantage they could get and much greater than they could have got had they prosecuted the suit, for they obtained the advantage of receiving all the sums that could be recovered, and yet leave it open to them to have all the accounts taken subsequently.

They take no step till 1846 ; they make no communication to Mrs. *Lowe*, and they make no claim against her. They never make (at least I have no evidence of it) any claim even by parol, although there is a great deal of evidence of parol declarations made by Mr. *Dalrymple* and Mr. *North*, supposing either or both to have been her agents : on the contrary, the Plaintiffs allow the matter to go on from the year 1834 (receiving payment of 1,980*l.* in 1836), without making any claim against her for anything further, beyond that which might be received from the outstanding debts.

After this, it certainly would seem to be somewhat hard to say, that they may insist on the accounts being taken, in exactly the same manner as they might have been taken when it was a perfectly fresh matter, when she or any person advising her might have looked into the affair and seen that the receiver had passed his accounts and that he had got in everything that was possible. To talk of putting persons back
in

in the position in which they were originally placed is absurd. How could that be done now? It is impossible to know what Mr. *Dalrymple* really did, even if I assume that he properly performed his duty as receiver.

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Can the payment of Mr. *Dalrymple*, out of the assets received by him as receiver, be treated as a payment by Mrs. *Lowe*, as her agent, to the executors of *Orred* as the persons entitled to it? It would appear to me to be contrary to every principle that I have ever conceived to prevail in a Court of Equity, in reference to any Statute of Limitations. Here a suit is instituted to take partnership accounts and to ascertain what is due to the parties, whereupon a receiver is appointed, and then it is argued, that a payment made by the receiver to one of them is to be treated as an acknowledgment by the other, so as to take the case out of the Statute of Limitations. All that can be said is, that they are payments which will be sanctioned in the suit, if, upon taking the accounts, it appear that they are fit and proper, but they are payments made by him in his character of receiver, and in that character he is merely the officer of this Court, and if he is the agent of one party, he is the agent of all parties, but only for that particular purpose of getting in the assets. The Plaintiffs might possibly be entitled to have had the suit prosecuted and the matters finally wound up, but to say that in respect of the partnership transaction, and in respect of what might be due from Mr. *Lowe* out of the suit, one of these payments is to be treated as taking it out of the Statute of Limitations, and thus prevent time from being a bar, is a proposition which could not be supported upon principle or any authority I have ever heard of, and which I should be very much surprised to find.

Another

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Another question arises out of the transaction of 1846, what that was, and how far it binds Mrs. *Lowe*. If a debt be due from a debtor to a creditor, and the agent of that debtor having the management of his affairs says to the creditor, "I have a fund in my hands to the payment of your debt," that may bind the principal; but it would depend on whether the act comes within the scope of the agent's authority. I do not think it necessary to go into that question, because the evidence which has been read to me falls far short of any such authority. The Plaintiffs say that no claim was made by this lady to the mortgage until after the death of *Dalrymple*. But it was known that the son disputed this transaction as soon as he attained the age of twenty-one; it was known that the lady herself disputed the transaction in 1850, if she did not do so before, and Mr. *Dalrymple* was alive then. If the case of the Plaintiffs is correct, the Statute of Limitations had not then deprived them of their claim. If they had any case they should have brought it forward when Mr. *Dalrymple* might have given evidence. But this lady seems to have contended before that time that the mortgage-money was due to her, and that she was the person entitled to it. Then the executors of the creditor, not having made this claim against the executrix of the debtor for a period exceeding twenty years, now insist on their right to do it, when they cannot put her in the situation in which she would have been, if they had made the claim, when she might have prosecuted the suit and have had the whole of the accounts taken. And although I think it extremely probable, that in taking the accounts it would appear that there was a balance due from *James Lowe* at his death to *George Orred's* estate, yet it is impossible for the Court to act on that surmise without the accounts being taken

taken (if it were possible so to do now), at a period when, as I repeat, it would be impossible for her to be in the same situation, either with respect to vouchers or to the getting in the assets, that she was at that former time. Who then is it that has occasioned this difficulty? The answer is, the Plaintiffs *Whitley* and *Lace*, who might have had their claim examined into at once, instead of which they received all the assets, and reserved this claim to the present period, and attempt to set up a case of lien in 1846, which appears to me altogether to be one of the weakest that I have ever seen presented to any Court of Equity.

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This suit therefore cannot be sustained, but as the mortgage-money is paid into Court in this suit, the better course will be to order that money to be transferred from this cause to the suit of *Lowe v. North*, (the suit instituted by Mrs. *Lowe* for the payment of the mortgage-money,) and then order that all proceedings be stayed in this cause, and that the Plaintiffs pay the costs of all the Defendants.

NOTE.—Affirmed by the Lords Justices on the 12th of *July*, 1858.

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July 29.

GREAVES *v.* WILSON. (No. 2.)

In conveyances subsequent to the 28th of April, 1855, to purchasers and mortgagees of lands, tenements and hereditaments, which are mortgaged, the judgment creditors of the mortgagees of the property, who are paid off prior to or at the time of the execution of the conveyance, need not concur.

THE Plaintiff, on the 29th of *July*, 1857, purchased a leasehold public-house from the Defendant; which was subject to a mortgage to Messrs. *Calvert & Co.*(a).

By the decree, it was declared, that the contract for sale ought to be specifically performed and carried into execution. And it was ordered that, upon payment of the purchase-money, the Defendant and all proper parties should execute and deliver to the Plaintiff a proper assignment of the premises comprised in the contract.

Subsequently, the affairs of Messrs. *Calvert* having become embarrassed, the Plaintiff's solicitor searched for judgments against them and found one entered up against them for 60,000*l.* The Plaintiff's solicitor, conceiving such judgment to be a charge upon their interest in the mortgage premises, objected to complete the purchase of the property.

It was now moved, on the part of the Plaintiff, that he might be at liberty to pay into Court the purchase-money, and that he might thereupon be let into possession.

The Plaintiff in his affidavit stated, that under the aforesaid circumstances, the purchase could not be completed

(a) See *ante*, p. 290.

completed or the decree enforced against the Defendant for a considerable time. That the Defendant was in possession of the property sold, which consisted of a public-house and appurtenances, and that he was carrying on there the business of a publican, which was very lucrative.

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Mr. *R. Palmer* and Mr. *Kay* in support of the motion.

Mr. *Lloyd* and Mr. *Smythe* *contrà*, insisted that this motion was unnecessary in consequence of the 18 & 19 *Vict.* c. 15, s. 11, it being the intention to pay off the mortgage out of the purchase-money.

The section is as follows:—

“And whereas great delay and expense are occasioned, upon purchases and mortgages of lands, in consequence of judgments against mortgagees and crown debts and liabilities to the crown mortgagees continuing to bind lands, although the mortgagees have been *bona fidâ* paid off, and the lands have been actually conveyed to purchasers or to other mortgagees, for remedy whereof be it enacted as follows:—Where any legal or equitable estate or interest, or any disposing power in or over any lands, tenements or hereditaments shall, under any conveyance or other instrument executed after the passing of this act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements or hereditaments shall not be taken in execution under any writ of *elegit* or other writ of execution to be sued upon any judgment or any decree, order or rule against any mortgagee or mortgagees

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to or at the time of the execution of such convey-
ance" &c.
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This motion is founded on a misconception that the 11th section of this act would not apply, and that unless the judgment creditor concurred in the conveyance the purchaser would not get a good title. The clause cited was intended to remove the great inconvenience, which previously existed in cases of this description, and the effect of it is this:—with respect to every conveyance after the passing of the act, if the mortgage be paid off either prior to or at the time of the execution of such conveyance, all persons having judgments against the mortgagee are prevented taking the mortgaged lands in execution.

I am of opinion that the judgment against *Messrs. Calvert* will not affect the completion of the purchase in the slightest degree.

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BELL v. CLARKE.

THE testator *John Browne Bell* had four children, namely, *Horace, John, Jane* and *Augustus*.

In 1838, the testator, on the marriage of his son *Horace*, covenanted with the trustees of his settlement, that he *John Browne Bell* would, by his will, (but subject to the directions contained therein regarding the management of, sale, disposition, getting in and realization of the same) well and effectually give, devise and bequeath unto the trustees "*one full fourth part of all the real and personal estate whatsoever of or to which he, or any person or persons in trust for him, should, at the time of the death of him, be seised, possessed or entitled in possession, reversion, remainder or expectancy; subject, as to the said personal estate, to one full fourth part of his debts, and of his funeral and testamentary expenses; and as to the real estates, to one full fourth part of so much of the debts and funeral and testamentary expenses as his personal estate should be insufficient to satisfy. And in default thereof, that from and immediately after his death, his heirs, devisees, executors or administrators should convey, assign and transfer one full fourth part of all the real and personal estate whatsoever of or to which he, or any person or persons in trust for him, should, at the time of his death, be seised, possessed or entitled, in possession, reversion, remainder or expectancy, subject nevertheless as aforesaid, unto the trustees.*

April 21.

Covenant by A. to bequeath to B., by will, "one full fourth part of the real and personal estate whatsoever of or to which A." should, at the time of his death, be entitled, and in default, that his heirs and executors should, immediately after his death, convey "one full fourth part" of it. Held, upon the context, to mean one-fourth in value, and not one undivided fourth of every item of property *in specie*.

And it was thereby agreed and declared that if *John Browne Bell* should, at any time or times, give or dispose

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pose of any part or parts of his then present or future real or personal estates, exceeding in value in the whole the sum of 100*l.*, to or in trust for, or for the benefit of, any of his children or any of their respective issue, or any other person or persons whomsoever, otherwise than for a full consideration in money or money's worth to be received by him *John Browne Bell*, and such gift or disposition should take effect in his lifetime, or after his decease, then and in every such case, the value of the real or personal estate which should so have been given or disposed of without a full consideration in money or money's worth should, for the purposes of the covenant last thereinbefore contained, be deemed and considered as part of the personal estate of which he *John Browne Bell* should die possessed. And it was thereby agreed and declared, that the trustees should stand seised and possessed of the said full fourth part or share of and in the real and personal estate of *John Browne Bell*, upon trust, as soon as conveniently might be after his decease, and as, under the covenant and provisions aforesaid, any real or personal estate should come to or be vested in them or him, absolutely to sell and dispose of the same fourth part of the real estate and of so much of the fourth part of the personal estate of *John Browne Bell* as should be in its nature saleable, in manner therein mentioned, and should, as soon as conveniently might be after the decease of the said *John Browne Bell*, call in and convert into money so much of the residue of the said fourth part of the said personal estate as should not consist of money, and should invest the money to arise therefrom and hold it on the usual trusts for *Horace Bell* and his wife for life, and the children of the marriage.

By the same indenture, the trustees were authorized to settle and adjust with the real or personal representa-

tives

tives or representative of *John Browne Bell*, or other the person or persons in anywise interested therein, beneficially or otherwise, or any creditor or creditors of the said *John Browne Bell*, any accounts or accounts, valuation or valuations, or other matter or thing whatsoever, in respect of the said fourth part of the said real and personal estate of *John Browne Bell*, and to make any compromise or arrangement touching the premises, or to refer any dispute or difference concerning the same to arbitration.

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There were two children of the marriage, namely, the Defendants *Noel* and *Frances*.

Horace Bell survived his wife and died in *January*, 1855.

John Browne Bell made his will in *May*, 1855, and he thereby gave unto his executors all his copyright, interest and property in the newspapers entitled "*The News of the World*" and "*The Magnet*," and all the machinery, engines, types, printing presses, plants, utensils and other articles and things used for the carrying on and printing and publishing the said newspapers respectively, upon trust that they should carry on and continue the publication of the said newspapers until the net gains and profits from such trade or business should not, in any year, amount to the sum of 500*l*, or until the persons beneficially interested therein should desire the said trade or business to be sold or disposed of. And the testator thereby gave certain directions as to the carrying on and publishing the newspapers and the management and superintendence thereof. And he gave the gains and profits and the produce (if discontinued and sold), to his son *John*, his daughter *Jane* and others, and he disposed of his residuary estate

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tate in the same way, to the exclusion of the children of *Horace* by his first marriage.

The testator *John Browne Bell* made no devise or bequest by his will in performance of his covenant contained in the indenture of settlement, and his will contained no reference to that covenant. He died on the 19th of *August*, 1853.

The question now argued was, whether the trustees of the marriage settlement were entitled to receive one-fourth of the testator's estate *in specie*, or one-fourth of its value at his death, the difference being, that in the former case they would have a right to one-fourth of the profits of the newspapers until their sale, which would far exceed the interest on the one-fourth of their value. The machinery and plant of the newspapers had been valued at 1,590*l.* and the good-will of them at 6,500*l.*

The trustees of the settlement, by their answer, insisted that the covenant of the testator ought to be specifically performed, and that they were entitled to have conveyed to them, *in specie*, one full fourth part of the real and personal estate.

Mr. *R. Palmer*, Mr. *Speed* and Mr. *Villiers*, for the Plaintiff, commented on the terms of the covenant, and argued that all which the trustees of the settlement were entitled to have was one-fourth of the value of the real and personal estate, without interfering with the specific legacies, except to make up that value, if necessary. They cited *Gregor v. Kemp* (a); *Logan v. Weinhold* (b);
Stocken

(a) 3 *Swan*. 404.

(b) 1 *Cl. & Fin.* 611.

Stocken v. Stocken (a); *Nayler v. Wetherell* (b); *Randall v. Willis* (c).

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Mr. Lloyd and Mr. Beales argued that specific performance was only given when damages were not a complete remedy, and that here, the payment of one-fourth of the value was a full satisfaction of the covenant.

Mr. Teed, Mr. T. Terrell, Mr. Follett and Mr. Haig for other parties.

Mr. Greene and Mr. W. Pearson, for two of the trustees of the settlement and the two infant children, argued that the covenant was express to bequeath "one full fourth part of all the real and personal estate," and in default that it should be conveyed, and that the covenant could only be performed by a conveyance of one undivided fourth of the whole; *Morgan v. Morgan* (d); *Jones v. Martin* (e); *Lewis v. Madochs* (f).

Mr. F. T. White for Mr. Mansell.

Mr. R. Palmer in reply.

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I do not think that the true construction of this covenant requires that one undivided fourth of every species of property belonging to the testator should be conveyed to the trustees of the settlement, but only one-fourth in value of what really belonged to him.

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(a) 4 *Myl. & Craig*, 95.

(b) 4 *Simon*, 114.

(c) 5 *Ves.* 274.

(d) 14 *Beav.* 72.

(e) 5 *Ves.* 265, note; 6 *Bro. P. C.* 437.

(f) 8 *Ves.* 149.

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CLARE.

The case referred to points out the great inconvenience of construing it as a covenant to convey one undivided fourth of everything the covenantor possessed, for the result would be, that he could not make a specific bequest of anything: he might bequeath three-fourths but he could not give the whole of a horse, or of a book or other chattel. That would be very inconvenient, but if that intention is clearly expressed, the Court must carry it into effect, however difficult. I think, however, that this is not the true construction of the covenant; for first, it does not say that one undivided fourth shall be conveyed, but "one full fourth part." It would not be necessary to say "one full fourth" if it is to be one actual undivided fourth; but in estimating what is one-fourth of the whole, the words "one full fourth part" are proper, in order that the estimate might be made in favor of the parties entitled to that fourth.

Again, the deed provides that if the testator disposed of property in his lifetime exceeding in value 100*l.* its value was to be treated and considered as part of the personal estate of which he died possessed. That is inconsistent with giving one-fourth part in specie. Suppose this case: that he disposed of 1,000*l.* stock in his life, then if, on his death, the trustees would be entitled to have one-fourth of all his property conveyed to them *in specie*, together with the value of one-fourth of the 1,000*l.* stock, the latter would have to be ascertained by taking away a portion of the other property to that value. So that you would have two modes of division,—first, by dividing *in specie* the whole into fourths, and then by taking one-fourth of the value of the stock out of the remaining three-fourths. But if the testator were merely bound to set apart one-fourth in value, it would be easy to arrange the

the division and make good what he had disposed of in his lifetime. Another reason for coming to my present conclusion is the clause making the fourth part of the personal estate subject "to one full fourth of the debts" of the testator, the whole being subject to them. Again, there is a power to the trustees of the settlement to settle and compound with the creditors of the testator. The trustees, by taking the whole of a debt due to the testator as part of their share, might then compound with the debtor, but that would be impossible if they took one undivided fourth of the debt.

Therefore it appears to have been probably contemplated, that if, in the apportionment of the property, which was to be done at once, a debt were given to the trustees of the settlement as their share, they were to have power to compound it.

I think then that the proper construction of the covenant is, that the executors are bound to set apart that which was the actual complete fourth part, in value, of the testator's real and personal estate. I am the more induced to hold so, by the consequence of an opposite conclusion, for if that were not so, the covenantees might be considerable losers, if the property happened to be wasted by the executors, they then would bear a part of the loss, in common with the legatees; but if they were creditors of the testator, they would be entitled to have the amount due to them paid out of the estate in the first instance, and in priority of the legatees.

Therefore, you must ascertain what was the value of one-fourth of the real and personal estate of the testator, and declare that the trustees are entitled to it under the covenant.

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A. B., having insured his ship, afterwards transferred it, but without the policy, to C. D. The transfer on the register, though absolute in form, was, in fact, by way of mortgage. The ship having foundered, *Held*, that A. B., being liable for the mortgage debt, had a sufficient interest in the ship to entitle him to recover the whole loss. *Held* also, that the policy of the Navigation Laws (17 & 18 Vict. c. 104) did not apply to such a case.

One of the rules of a mutual marine assurance society provided, that "no vessel which is mortgaged shall be

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"THE Eligible Insurance Association" was a mutual assurance society established at *North Shields*. Its members consisted of a number of ship owners who mutually insured each other's vessels against loss, and agreed to contribute, in rateable proportion, to such losses, to the extent of the sums insured. The association was continued from year to year, and was regulated by its printed rules. The sixth rule was as follows:—

"That ships lost or detained by the restraint of princes or powers shall be liable to contribute five days after being so lost or detained, *but ships sold shall be off risk from the date of the transfer, provided notice in writing be given within ten days after such transfer, neglecting to do so, only to be off risk when such notice is given to the secretary*; and ships stranded but not totally lost shall be free from risk of others (except fire and harbour risk) fifteen days after such event, and shall remain so until the day at noon on which they are got off the strand; and in case of the failure or insolvency

vency

DATES.

1855, Feb. Policy.

1856, Jan. Ship lost.

Aug. Transfer to *Pierce*.

Feb. Insurance expires.

insured, unless the mortgagee give a written guarantee, to the satisfaction of the committee, for payment of all demands on the said vessel." *Held*, that this applied only to a ship mortgaged at the time of effecting the insurance, and that it did not render a guarantee necessary when a ship was mortgaged after being insured.

A suit in equity is maintainable by a member of a mutual marine insurance society against the managing committee, to recover, by a contribution among the members, the amount of his loss. Form of the decree in such a case.

vency of any member, the insurance shall cease six days after the date of such event, unless the assignees or other approved persons will guarantee, by written document, the payment of all average bills in arrear and which may become due thereafter. *No vessel which is mortgaged shall be insured unless the mortgagee give a written guarantee to the satisfaction of the committee for payment of all demands on the said vessel."*

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The Plaintiff Mr. *Hutchinson* was the registered owner of 16-64ths of the ship *Boyne* ; he joined the association, and in 1855 insured his interest in that ship to the extent of 500*l*. The insurance was for one year, commencing on the 20th of *February*, 1855, and the policy incorporated the rules of the association.

On the 18th of *August*, 1855, the Plaintiff executed an absolute transfer of his 16-64ths of the *Boyne* to the Defendant Mr. *Pierce*. The transfer was registered at the port of *London*, and was absolute on the face of it; but it was really in the nature of a mortgage for 432*l*. 10*s*. and the right of redemption was proved.

No notice of this transfer was ever given to the secretary of the association.

On the 27th of *January*, 1856, the *Boyne* was totally lost near *Varna*, and the Plaintiff thereupon claimed the 500*l*. from the association. The claim was resisted under the sixth rule, on the ground that as soon as the Plaintiff had sold his share in the vessel, she ceased to be insured in the association.

The bill was filed by Mr. *Hutchinson* against nine gentlemen who formed the committee of the association and Mr. *Pierce*, praying a declaration of the right

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of the Plaintiff to payment of 500*l.* out of the moneys and property of the association or by the contribution of the members, and that the committee might pay it to the Defendant *Pierce*.

Mr. *R. Palmer* and Mr. *Southgate* for the Plaintiff.

There is nothing in the sixth rule which prevents the Plaintiff recovering on the policy. It provides that the risk is to cease under certain circumstances, namely, on a sale of the ship, and that an insurance is not to be effected under certain other circumstances, namely, when the ship is mortgaged at the time. The second part of the rule refers only to a ship mortgaged at the date of the policy, and not to the case of an insured ship being afterwards mortgaged; the words are "no vessel *which is* mortgaged shall be insured." Here, though the transfer on the register is absolute, the evidence distinctly shews that the transaction was really a mortgage, and that the Plaintiff had a sufficient insurable interest at the time of the loss.

In *Alston v. Campbell* (a) *A.* having insured 800*l.* upon his own ship, and being greatly indebted to *B.*, deposited several securities in his hands, and also made an absolute assignment to him of this ship. The ship was afterwards lost. On an action brought against the underwriters to recover the insurance, they insisted that the policy was void for want of interest, under the statute 19 *Geo. 2*, c. 37 (against wager policies), *A.* having sold the ship previous to the loss. But it was held that he had a sufficient interest in the ship at the time of the loss; the real transaction being no more than a pledge or security for the debt due to *B.*

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(a) 4 *Bro. P. C.* 476.

The policy of the navigation laws has no application to such a case as the present; it applies to ships only, and not to independent contracts respecting them, as a policy of assurance on a vessel. This was decided in *Ladbroke v. Lee* (a). Besides this, the law has been recently altered, and the effect of the recent Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 43, 55, 100, 107) is to recognize the existence of unregistered interests in British ships, and registered ownerships in trust for persons not named on the register; thus making the registered owner personally responsible for breaches of trust in a Court of Equity, but without prejudice, as respects *bonâ fide* purchasers not implicated in the fraud or breach of trust, to any title derived by them from him; *Abbott on Shipping* (b).

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Lastly. This Court has jurisdiction to give relief in this case, for it is in equity only that the other members can be compelled to contribute their shares of the loss; *Taylor v. Dean* (c); *Law v. The Indisputable Assurance Society* (d).

Mr. Elderton, for Mr. Pierce, argued, that if the Plaintiff had an insurable interest at the time the policy was effected, no change which might have since taken place in the property in the ship could have the effect of relieving the underwriters from their liability, and that the Plaintiff might sue on the policy for the benefit of the party to whom such property had passed; *Sparkes v. Marshall* (e).

Mr. Follett and Mr. T. Stevens for the committee. This is a question of legal liability, and is whether any

(a) 4 De G. & S. 118.
(b) Page 51 (10th ed.)
(c) 22 Beav. 429.

(d) 1 Kay & J. 229.
(e) 2 Bing. N. C. 774.

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any person, other than the true owner of a ship, can insure it? There can be no equitable, apart from the legal liability on the policy. In *Law v. The Indisputable Assurance Society* (a) there was a lien on the assets of the society, and this made it necessary to come into Equity; but here the liability is personal. The transfer from the Plaintiff to *Pierce* in August, 1855, was absolute. *Pierce* therefore became and he is now the sole and absolute registered owner of the ship, and the Plaintiff ceased to have any legal or equitable interest in it. Consequently, no loss was ever sustained by him by the wreck, for this was a mere contract of indemnity.

Down to the passing of the last act (17 & 18 Vict. c. 104) the Plaintiff could not, after the assignment to and registration in the name of *Pierce*, as the absolute owner, have enforced any right against the ship; *Morris v. Hughes* (b); *M'Calmont v. Rankin* (c); *Morris v. Hughes* (d); *Sharp v. Taylor* (e); *Mestaer v. Gillespie* (f); *Stockdale v. Dunlop* (g).

The case of *Ladbroke v. Lee* (h) does not apply, for there the insurers were not parties; but the brokers having received the money the question was, who was entitled to it as against the brokers. So in *Armstrong v. Armstrong* (i) the money had been received.

The law is not altered by the recent act 17 & 18 Vict. c. 104 (k), for the registry is conclusive as to the absolute

(a) 1 Kay & J. 223.

(b) 2 De G., M. & G. 349.

(c) *Ibid.* 403.

(d) *Ibid.* 349; 9 Hare, 636.

(e) 2 Phill. 801.

(f) 11 Ves. 621—625.

(g) 6 Mec. & W. 224.

(h) 4 De Gex & Sm. 106.

(i) 21 Beav. 78.

(k) See *The European &c. Mail Co. v. The Royal Mail Steam Packet Co.*, 5 Jurist, N. S. 310.

lute ownership of the ship. The statute imperatively requires that a mortgage and absolute transfer shall be in the prescribed forms, and the form of absolute transfer to *Pearce* is conclusive as against the Plaintiff that he had no interest in the ship at the time of the loss.

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A marine or fire insurance is a contract of indemnity, and differs from a life assurance. In the latter case, the alteration of the interest of the insurer does not affect his rights on the policy; *Dalby v. The India and London Life Assurance Company (a)*, overruling *Godsall v. Boldero (b)*. But in the former, the insurer can only recover his actual loss; *Hamilton v. Mendes (c)*; *The Sadlers' Company v. Badcock (d)*; *Powles v. Innes (e)*; *Stockdale v. Dunlop (f)*. The interest, therefore, must exist both at the time of the insurance and remain until the time of the loss.

The true construction of the sixth rule is, that if a member ceases to be the owner the insurance and liability are at an end. No vessel "which is mortgaged," that is mortgaged at any time, "shall be insured," that is shall stand insured. According to the Plaintiff's interpretation of the rule, although the owner could not insure his ship if mortgaged, yet he might insure and mortgage it the next day without any assent of the other members. That was not intended, unless the mortgagee should give his guarantee for payment of all demands on his vessel; this construction alone is consistent with the terms of a mutual assurance.

They

(a) 15 C. B. Rep. 365.

(b) 9 East, 72.

(c) 2 Burr. 1198.

(d) 2 Atk. 554.

(e) 11 Mee. & Wel. 10.

(f) 6 Mee. & W. 224.

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They also cited *Camden v. Anderson* (a); *Robinson v. Gleadow* (b).

Mr. R. Palmer in reply.

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I will look into the case. I do not think anything turns on the evidence.

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April 22.

I think the Plaintiff is entitled to a decree. The facts of the case are these:—In 1855, the Plaintiff insured his interest in the *Boyne* for 500*l.* in “The *Eligible* Insurance Association.” This association insured in this manner:—each member was liable, in respect of the amount insured on his own ship, for the loss sustained by any other member, so that the members became underwriters in proportion to the amount of the insurance they effected. No premium was paid, but when a loss occurred it was to be made good by the other members.

In *August*, 1855, the Plaintiff mortgaged his interest in the ship to Mr. *Pierce* for 432*l.* 10*s.* and the mode by which that sum was secured was this:—the ship was registered in the name of mortgagee, not as a mortgagee but as absolute owner. However the evidence is clear that the transaction was a mortgage, and that on payment of the debt, *Pierce* was bound to re-transfer the ship to the Plaintiff. This being the character and nature of the transaction, the first question is, what is the effect of the rules of this association? The sixth rule provides that “ships sold shall be off risk—

from ~~the~~

(a) 5 *Term Rep.* 709.

(b) 2 *Bing. N. C.* 156.

from the day of the transfer, provided notice in writing be given within ten days after such transfer; neglecting to do so, only to be off risk when such notice is given to the secretary." Now what was the effect of this? If the insured ship had been sold, the effect would probably be, that there would have been no insurance on it, unless it had been duly transferred to the purchaser, who would then be bound to become a member of the association; but the liability of vendor continued till notice.

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The concluding words of the rule are "no vessel which is mortgaged shall be insured unless the mortgagee give a written guarantee, to the satisfaction of the committee, for payment of all demands on the same vessel."

The question is whether the effect of this is, that the insurance ceases as soon as a mortgage is made, unless the mortgagee enters into a guarantee to the satisfaction of the committee.

I am of opinion that this is not the effect of the rule. The insurance is for a year certain, and the meaning is, not that the insurance shall cease unless the mortgagee enters into a guarantee and thus gives a double security, but merely that if the ship be mortgaged at the time of the insurance, all persons interested, that is, the mortgagee and mortgagor, shall enter into a guarantee for payment of all the demands on the vessel.

The next question is, whether the form of the register affects the question. I think not. Though it is in form a sale, I am satisfied it was merely a mortgage of the ship as between Plaintiff and *Pierce*, and when the money is repaid, the Plaintiff will be entitled to have the ship restored to him.

G G 2

I think

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I think also that this disposes of the second question, which is, whether the interest which the Plaintiff had in the ship was such as entitled him to recover against the underwriters. I am of opinion that it was. It is argued, that by force of the statute, the interest of the Plaintiff after *August*, and at the time when the loss occurred, was such, as would not have allowed him to insure the vessel, and that at law and in equity *Pierce* was, by force of the statute, the real owner of the vessel, and that therefore the Plaintiff could not insure it, and that he must have an interest similar to the first insurer to entitle him to recover from the underwriters. Assuming this to be the true construction of the last statute, I think that the consequence insisted on does not follow. When the insurance was effected, the Plaintiff was the owner and was entitled to insure, and he effected a valid assurance.

It is then said, that this is a contract for indemnity, and cases were referred to on the subject. I concur in that view, and from whence it follows that the loss must have been sustained by the person who makes the insurance to enable him to recover; and here, if the evidence be true, the loss was *bonâ fide* sustained by the Plaintiff. *Pierce* was entitled to recover the amount of the debt, and the entire loss fell on the Plaintiff and no one else.

I admit if there had been a sale of the vessel to *Pierce*, then, independently of the question on the sixth rule, the Plaintiff could not have recovered, because he would not have sustained any loss, and *Pierce* could not have recovered, because the benefit of the assurance had not been assigned to him. But when the loss has really been sustained by the person effecting the assurance, can it be held, because, for reasons of state policy, the

the beneficial owner of a ship shall not be treated as such in any Court of Law or Equity, unless his name be entered or put on the register, that therefore the insurers, who have accepted the insurance and undertaken to make good the loss, can avail themselves of this provision of the statute, for the purpose of saying, that though the insurance was valid at the time of the contract, the indemnity only extends to such losses as may be sustained in respect of an interest duly entered on the register. The effect would be, that if, through inadvertence or error, the name of the person who effected the insurance is not on the register as owner at the time when the loss actually occurs, still, although the insurers entered into a valid contract to indemnify him against any loss he might sustain, and although that loss has actually occurred, they are relieved from their contract and get rid of all liability by force of the statute.

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To sustain such a defence I am of opinion there ought to be an express contract, to the effect, that unless the name of the person effecting the insurance is on the register at the time of the loss, he shall not recover. Nothing of the sort appears on the policy or in the statute.

The cases establish this point, that the Court does not look at little technical details, to ascertain whether the person effecting an insurance fills one character or another, but to the fact whether he has *bonâ fide* sustained loss, and in this case the Plaintiff's loss is clearly and distinctly proved.

I am of opinion therefore that the Court is bound to give effect to the agreement, and cannot, upon technical grounds drawn by analogy from the statute and in a case where the evils the statute was framed to obviate do not exist, relieve the Defendants from their liability under their written contract.

I must

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I must therefore declare, that the Plaintiff is entitled to be paid, out of the moneys and property of the said association or by the contribution of the members of the said association, in accordance with the rules, the balance of the sum of 500*l.* after deducting the several payments, which the Plaintiff, as one of the members of the said association, was bound to make in respect of averages and losses of the ships of other members of the said association; and that the Defendants, the committee, must be decreed to pay the amount of such balance to the Defendant *Pierce* (the Plaintiff consenting thereto) out of the money and property of the association, or to draw bills and otherwise to procure the contribution of the members for that purpose, according to the customary mode of payment in use by the society.

I must also direct an account of the funds of the association of 1855 in the hands of the Defendants, and payment thereout, so far as the same will extend, of the amount due to the Plaintiff and the costs of suit, and as to any deficiency, I must order the Defendants to raise and pay the same by the means provided in and by the seventeenth article of the rules of the association of 1855. Liberty for the parties to apply as they may be advised.

NOTE.—The 17th rule was as follows:—"That the committee shall meet on the 20th *February*, 20th of *May*, 20th of *August* and 20th of *November*, to adjust such claims, and any member, who shall prove to the satisfaction of the committee that his ship is lost, will be entitled to prompt payment for the same, at the expiration of two months from the date of the first quarterly settlement after he has furnished such proof, and the committee are empowered to draw bills, at such dates as to them may appear best suited to the state of the society at the time, which bills the secretary must get accepted. Any member refusing or neglecting to pay the same when due shall be no longer insured, after notice has been given him by the secretary, but must contribute to all others during the continuance of the policy, and no policies shall be given to those who have not paid their losses and averages on the last. A suffering member shall not be liable to his or her own loss but shall contribute to the damage his or her ship may do to others."

1858.

CLARKE v. WOODWARD.

MR. WALLACE, in right of his wife, was entitled in reversion to half a sum of 3,824*l.* standing in Court.

In 1821, he sold and assigned it to *Fletcher*, the assignment reciting the death of his wife, and his title to it as her administrator. In 1826, *Fletcher* sold and assigned the fund to *Thompson*, who obtained a stop order, and this was the only one affecting it.

The tenant for life having died, a petition was presented for payment out of Court of the fund to *Thompson*.

The MASTER of the ROLLS, on a former occasion, required an affidavit of no settlement to be produced.

Mr. Rasch now produced an affidavit, shewing that inquiries had been made after *Mr. Wallace* and the attesting witnesses to the assignment, but which had proved ineffectual, and also shewing the impossibility of obtaining the usual affidavit of no settlement. He submitted, that, all means of obtaining it having been exhausted, and there being no other stop order on the fund, the Petitioners were entitled to the order.

The MASTER of the ROLLS.

If I had evidence that there were no children of the marriage, I should have no difficulty in making the order.

April 17.

A fund in Court belonged in reversion to a married woman. After her death, the husband, in 1821, sold and assigned it. The tenant for life died, and it having been found impossible to obtain from him an affidavit of no settlement, the Court, in 1858, ordered payment to the assignee without one, on proof of there having been no children.

1858.

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WOODWARD.

order. In all probability, the wife and children would be the only persons having any interest under any settlement.

The order may go upon an affidavit of there having been no children.

Re DALY'S SETTLEMENT.

May 7.

A testamentary instrument, signed but invalid for want of attestation, is not a good execution of a power to appoint by writing signed or by will.

A *feme covert*, living apart from her husband, has no power to change her domicile.

A *feme covert* had a power to appoint by her will, "notwithstanding her coverture, and as if she were sole and unmarried." She lived in France thirty years, apart from her

husband, who was domiciled in *England*. Held, that her will, which was valid, in respect of formalities, by the French law, but invalid as regarded the English law, was not a due execution of the power.

MRS. *BLAGRAVE* was the wife of a domiciled Englishman. She had, under her marriage settlement, dated in 1807, a power of appointment over a fund held by trustees, for such intents and purposes as she, "by writing or writings signed by her with her own hand, or by her last will and testament in writing, should, notwithstanding her coverture, and as if she were sole and unmarried, direct or appoint," and for want of such appointment, for her separate use, and after her decease for the sole use and advantage of her executors and administrators, without the let, control or intermeddling of her husband. In 1815, she separated from her husband, and in 1822, she went and resided in *Paris*, separate and apart from her husband, but without any legal separation, and she so continued until *November*, 1856, when she died in *Paris*, having, for upwards of thirty years, lived apart from her husband in *Paris*. Her husband survived and continued domiciled in

in *England*. She left three unattested documents in her own handwriting, which were valid testamentary papers according to the law of *France* (being holographs) (*a*), but void, as such, according to the law of *England*, (her husband's domicil,) they being unattested (*b*).

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In re
DALY'S
SETTLEMENT.

These documents were as follows:—The first was in a closed envelope, bearing this indorsement, signed by Mrs. *Blagrove*, "To be opened at my death." It proceeded thus:—

"In the name of *God*, Amen. I, *Rachael Suzanna Blagrove*, wife of *Anthony Blagrove*, esq., of *Barrow-house*, near *Bristol*, *Somersetshire*, make this my last will and testament. I give and bequeath to my grand-daughter, *Frances Rachel Digby*, the child of my beloved lost daughter, the sum of 3,000*l.* sterling [which was part of the fund subject to the power], now in the £3:5*s.* per Cents.; the agents, *Alexander Fletcher & Co.*, *London*; trustees, *Charles Dashwood Bruce* and *John Henry Blagrove*, esqrs. To my godson, *Edmund John Charlton*, I give 226*l.* 2*s.*, and whatever money may be found, after paying my interment and my just debts," &c. &c.

The document then made other gifts, and ended thus:—

"This is my earnest wish and my last will.

"*R. S. Blagrove*, 26th July, 18 ."

The second and third documents were signed by her, but were also unattested. They were dated respectively the 12th of *May*, 1854, and "July 22, 1856."

By

(*a*) *Code Civil*, Arts. 226, 969, 970. (*b*) 1 *Vict. c.* 26, ss. 9, 10.

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By these she made certain gifts, gave directions as to her burial in *Père la Chaise*. It is unnecessary to state them, the Court holding them to be testamentary.

After her death, letters of administration of her personal estate were granted by her Majesty's Court of Probate to the Petitioner, her surviving son, upon the renunciation and consent of her husband.

The trustee paid the fund into Court under the Trustee Relief Act. In his affidavit, he stated, that the legatees under the three instruments alleged, that Mrs. *Blagrove* had a French domicile at her death, and that the three papers constituted a valid testamentary disposition according to the law of *France*.

This was a petition by the son and administrator of Mrs. *Blagrove*, praying payment of the fund to him.

Mr. *Lloyd* and Mr. *Rendall*, in support of their validity as appointments, argued, that though they might be void as testamentary papers, properly so called, of Mrs. *Blagrove*, still that they were undoubtedly "writings signed by her with her own hand," and as such valid appointments of the fund.

Mr. *R. Palmer* and Mr. *Ware*, *contra*.

The following cases were referred to:—*Tovey v. Lindsay* (a); *Warrender v. Warrender* (b); *Bainbridge v. Smith* (c); 1 *Vict. c. 26, s. 10*; *Sugden on Powers* (d) = *Watts v. Shrimpton* (e); *Robins v. Dolphin* (f).

Th

(a) 1 *Dow.* 124.
(b) 2 *Cl. & F.* 488.
(c) 8 *Sim.* 86.

(d) 289 (6th edit.)
(e) 21 *Beav.* 97.
(f) 4 *Jurist (N.S.)*, 267.

The MASTER of the ROLLS, during the argument, said, that there was no doubt but that the acts of this lady would have effected a change in her domicile, if it had been competent for her to do so.

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Mr. *Busk* for the trustee.

The MASTER of the ROLLS.

I think I cannot get over the cases, which are decisive of the question, whether this is an execution of the power, as being under the hand of Mrs. *Blagrove*. There are three instruments, which I am clear are all testaments in form. They direct what is to be done on her death, where she is to be buried, and in every one there are bequests of property, to take effect on her death and not before. I do not, therefore, doubt that they are all testamentary, and that before the last Wills Act, they would have been provable in the Probate Courts of this country.

Suppose the first had been duly attested by two witnesses, and that the others were in their present form, and that they were conflicting, which would take effect? Yet it is clear, that she intended them all to take effect at the same time. To be valid as an act *inter vivos* there ought to have been some delivery of them, so as to shew an intention that they should operate at once.

The case of *Bainbridge v. Smith* (a), appears to me to be exactly in point, and the words seem to be the same as the present. The power there was to be executed by any writing attested by two or more witnesses, or by will attested by three or more witnesses, and the will

was

(a) 8 *Simons*, 86.

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was attested by two witnesses only. That case is as near the present as possible. It was endeavoured to support it as a writing attested by two witnesses, but the Vice-Chancellor of *England* said, "that the donor of the power had himself drawn the distinction between writings that were testamentary and writings that were not testamentary, and had required the former to be attested by three witnesses and the latter by two only; that the instrument in question was testamentary in its nature, but was attested by two witnesses only, and consequently that it was not a good exercise of the power."

It is exactly the case here: the law requires that the execution of a will shall be attested by two witnesses. Mrs. *Blagrove* has not thought fit to get these testamentary instruments so attested, and they cannot, therefore, take effect at all.

The next question is, whether they are good testamentary instruments according to the French law. I have no doubt they are, if they had been executed by a Frenchman; and that raises the question, whether Mrs. *Blagrove* could obtain a domicile in France different from that of her husband? I am of opinion that she could not.

In the case referred to of *Tovey v. Lindsay (a)*, there appears to have been no decision on the points argued. It was a very strong case, because there was an express covenant by the husband to allow his wife to reside separate and apart from him "in such place and places as she should think proper:" and there is this observation to be made on *Warrender v. Warrender*, that the

Lord

(a) 1 Dow. 124.

Lord Chancellor considered that the facts did not amount to a change of domicile by the wife after the separation.

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SETTLEMENT.

ROLT v. HOPKINSON.

BY an indenture, dated the 26th of *January*, 1855, *May 25, 28, 29.*
and made between Mr. *Mare* of the one part, and *Where a first mortgage extends to future advances, further advances made by the first mortgagee, after notice of second mortgage, have no priority over the latter.*
Hopkinson and two others (the public officers of the Commercial Bank of *London*) of the other part, after reciting that Mr. *Mare* had opened an account with the Commercial Bank, and that it had been agreed, in order to secure the sum then due and which might from time to time become due from Mr. *Mare* on the balance of such account (not exceeding 20,000*l.*) that Mr. *Mare* should execute a mortgage of the hereditaments, &c. stated, Mr. *Mare* conveyed the property to *Hopkinson, &c.*, subject to redemption on payment by Mr. *Mare*, on demand, unto the Commercial Bank of *London*, of all and every sum and sums of money which then was or were, or at any time and from time to time thereafter should or might become due or owing from or by Mr. *Mare*, his executors or administrators, to the Commercial Bank of *London*, or the public officers or officer thereof for the time being, on the balance of his account current with the bank, or to the trustees or trustee for the time being thereof, either for money paid or advanced or to be paid or advanced by the Commercial Bank, or by the trustees or trustee for the time being thereof, unto or on account of

DATES.

1855, *Jan.* 26. Mortgage to Defendant to secure further advances.
Feb. 12. Mortgage to Plaintiff.
July 23. } Further advances made by Defendant.
Sept. 15. }

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of Mr. *Mare*, or what should be secured by any and every bond, bill of exchange or promissory note, drawn, accepted, indorsed or made by Mr. *Mare* upon, to or in favour of the bank, or any person or persons on behalf thereof, or accepted or paid by the bank or person or persons for honor on his account, or for or in support of his credit, or which should become due or payable from or by Mr. *Mare*, his heirs, executors or administrators, to the bank, or any trustees or trustee, officers or officer, for and on behalf of the same, upon any contract or in any other manner whatsoever, with interest. And it was provided, that the principal sum thereby secured should not exceed 20,000*l*.

The Plaintiff, Mr. *Rolt*, who was the father in law of Mr. *Mare*, had notice of this mortgage.

Afterwards, by an indenture dated the 12th of *February*, 1855, and made between Mr. *Mare* of the one part, and Mr. *Rolt* of the other part, Mr. *Mare* conveyed the same property to the Plaintiff, Mr. *Rolt*, subject to redemption, on payment by Mr. *Mare* unto the Plaintiff, on demand, of every and all sum and sums of money which then was or were, or at any time, or from time to time thereafter, might become due or owing from Mr. *Mare* to the Plaintiff, for money lent, paid or expended for or on account of Mr. *Mare*, and all other sums of money which the Plaintiff should be called upon or required or enabled to pay, either solely or jointly with any other person or persons, on account of Mr. *Mare*, with interest.

The stamp on this mortgage only covered 30,000*l*. Both these mortgages were prepared by the same solicitors; besides which, the Court held, on the evidence, that notice of this second mortgage had been immediately given to the Commercial Bank.

After

After this, the Commercial Bank made the following further advances to Mr. *Mare*, i. e. 8,000*l.* on the 23rd of *July*, 1855, and 7,500*l.* on the 15th of *September* in the same year.

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Mr. *Mare* became bankrupt on the 25th of *September*, 1855, and the question then arose whether the subsequent advances of 8,000*l.* and 7,500*l.* had priority over the Plaintiff's security.

Mr. *R. Palmer*, Mr. *Waller*, and Mr. *Herbert Smith*, for the Plaintiff, relied on *Shaw v. Neale (a)*, which over-ruled *Gordon v. Graham (b)*.

Mr. *Lloyd* and Mr. *J. H. Taylor*, for the Commercial Bank, argued, that Mr. *Mare* could not, by any subsequent act, alter the extent and nature of the security previously given to the Commercial Bank; that there was a distinction between the cases of *Shaw v. Neale*, and *Gordon v. Graham*. They pointed out the inconvenience and inconsistencies to which the doctrine relied on by the Plaintiff would lead.

The MASTER of the ROLLS.

I think that the facts of this case raise the same question as that which was practically determined in *Shaw v. Neale (a)*. I think it is proved that Mr. *Rolt* had notice of the mortgage to the Commercial Bank, and knew every thing about that transaction, and that distinct notice of the mortgage to Mr. *Rolt* was given to the Commercial Bank, at the time the mortgage deed

May 29.

(a) 20 *Beav.* 181; 6 *House of L. Cas.* 581, 597, 608.

(b) 2 *Eq. Abr.* 598, pl. 16; 7 *Vin. Abr.* 52, pl. 3.

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deed was executed : if so, that raises the question determined in *Shaw v. Neale*. Such notice is a matter of considerable importance, for I hold, that if no such notice had been given to the Commercial Bank, they would have been entitled, until they had notice of some subsequent charge, to tack their subsequent advances to their original security. But as soon as such notice had been given, they knew that there was another charge upon the property, of such an amount as to make it extremely dangerous for them to make any further advance upon their security. It was suggested, that this doctrine would very much imperil the dealings of bankers, but I am unable to follow that argument, because, undoubtedly, the same principle applies to all other persons, whether bankers or not, who advance money on mortgage. A mortgagee may go on advancing money and adding to his security until he has notice of another charge ; but as soon as he has that notice, he can no longer do so, for he then knows that there is another charge interposed between his existing security and any further advances he may make.

I do not think there would be much difficulty in the case suggested by the Defendant's counsel, if it arose. That is, if a notice were given at twelve o'clock at the bank, and a few minutes afterwards they paid over a large sum, which altered the balance between them and the mortgagor. But it is unnecessary to consider that question, because it does not arise before me.

Neither do I think it necessary to enter into the suggested difficulty of ascertaining the priorities of a number of successive advances made by both parties, and whether they would interlace one with another, so that the priorities of the advances of the two mortgages would alternate. I undoubtedly think that the advances would

would rank according to their respective dates, and if fresh advances authorized by the deed were made, it would become the duty of the mortgagees to inform the other person that they had made such fresh advances, which would constitute a prior charge to any sum not already advanced by that other person. But the probability is, that a banker who had received notice of an additional charge would not be disposed to make any fresh advances on the same security.

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I think nothing turns upon the fact, that Mr. *Mare* gave the Plaintiff a security in a form similar to the Defendants, that is, for future advances to be made by the Plaintiff, because the stamp only covered 30,000*l.*, and therefore the bank had notice, at all events, that if 30,000*l.* were due at that time, it was covered by that mortgage.

Such being the circumstances, I am of opinion, that *Shaw v. Neale* governs this case, and that the distinction attempted to be taken between *Shaw v. Neale* and *Gordon v. Graham* will not prevent the principle of law applying to this case. It was suggested that there was this distinction between *Shaw v. Neale* and *Gordon v. Graham*:—That in *Gordon v. Graham* the second mortgagee had notice of the nature and character of the first mortgage, whereas, in *Shaw v. Neale*, the second mortgagee had no such notice, and that, in this case, the second mortgagee had distinct notice of the nature of the first mortgage. But the important point is this: whether the first mortgagee had notice of the second mortgage; because if he had, he then knew that he could not, with safety, advance any more money; the effect of a person having notice of a prior charge is merely this:—that he then knows, that everything due upon that first charge has priority over his. I think that that is the meaning of the observations made by Lord

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*St. Leonards* and the other judges in commenting on the case of *Gordon v. Graham*.

My opinion therefore is, that the case of *Shaw v. Neale* having received, as it has, the sanction and authority of the House of Lords, is a case which I am bound to follow on the present occasion, and that it would be impossible, without drawing distinctions, which appear to me not founded on any reasonable ground, to say, that the second mortgage shall be a good mortgage and have priority over subsequent advances, provided the second mortgagee had no notice of the first mortgage; but that it shall not have such priority if he had notice of the first: while it is admitted that the notice is of no importance, unless the first security was for future advances as well as for the existing balance. But the security, so far as it relates to future advances, does not exist until the advance is made. I think that such a distinction would be much too thin to be supported, and that the rule laid down in *Shaw v. Neale* applies to the present case.

I am of opinion, on the evidence, that it is established that the bank had knowledge of the deed of the 12th of *February*, 1855, immediately after its execution, and that such notice gave priority to Mr. *Rolt's* mortgage over any advances made by the bank subsequently to that period. I am also of opinion that the sums of 8,000*l.* and 7,500*l.* were advances made subsequently to that period, without any sanction or joint liability of Mr. *Rolt*, and the result must be, that his security must have priority over what may remain due to them upon those sums.

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NOTE.—Affirmed by Lord *Chelmsford*, L. C., 9th Nov., 1858. An appeal to the House of Lords is intended.

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1858.

## SANDERS v. HOMER.

March 27.

April 26.

**T**HE testator directed certain moneys to be invested in "the £3 per Cent. Consols," the interest "to be appropriated for the use and maintenance of his wife *Mary Ann Sanders*, and his daughter *Mary Ann Sanders* until she should attain the age of twenty-one years, when he directed the principal to be sold out, and to be divided equally between his wife *Mary Ann Sanders* and his daughter *Mary Ann Sanders*.

The sole trustee of money for *A.* and *B.* invested it in Stock, in the joint names of himself and *B.* (an infant). After the deaths of the trustee and *A.*, the infant was held to be a trustee within the Trustee Acts, and a vesting order was made.

The testator died in 1844, and his wife in 1849.

*Homer*, the executor and trustee, having realized the fund, invested it in Consols in the joint names of himself and *Mary Ann Sanders* (an infant).

*Homer* died in 1867, and *Mary Ann Sanders* being still an infant, no one had power to receive the dividends; this suit was, in consequence, instituted.

A decree was made, but in drawing it up, a difficulty arose in the Registrar's office, as to whether an order could be made in this case, under the Trustee Acts, vesting, in another person, the right to transfer the stock, in lieu of the infant.

Mr. *Rogers* now mentioned the case to the Court, and submitted, that the present case came within the Trustee Acts; for, although it had been decided by Sir  
*James*



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*James Parker* in *Cramer v. Cramer* (a), that an infant, who was sole trustee, was not within the first act (13 & 14 *Vict.* c. 60), still the difficulty had now been removed by the subsequent act (15 & 16 *Vict.* c. 55, s. 3).

*The MASTER of the ROLLS* said, he thought he could make the order.

It was made in the following form :—

It appearing that the executors of *Homer* were jointly entitled with the infant to the fund, upon a trust within the meaning of the act, the Court ordered, that the right to call for a transfer should vest in the executors of *Homer*, for the purpose of transferring the fund into Court.

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(a) 5 *De Ges & Sm.* 312.

1858.

## REID v. REID.

April 17, 26.

THE testator *George Reid* made his will in 1822, which was as follows:—"To my wife *Ann Reid* my copyhold house and premises, situate at No. 53, *Goodge Street, Tottenham Court Road*, with all other property, whatsoever and wheresoever, I may die possessed of or be hereafter entitled to, for her life, to be disposed of, at her death, amongst my children, as she shall think proper."

Gift to wife for life, "to be disposed of, at her death, amongst my children as she shall think proper." Held, to confer a power to appoint, by will, amongst his children living at her death, and an implied gift in default of appointment.

The testator died in 1823.

He left his widow and five children surviving, namely, the Plaintiff *George*, his heir, *William*, who afterwards died in 1848, *John*, who died in 1836, and the Defendants *James* and *Ann*.

A testatrix having property of her own, and a power to appoint to her children other property of which she was tenant for life, gave "the whole of the ground residue of her

The testator, at his death, besides the *Goodge Street* house, had freehold property in *Clerkenwell*, and a ground property," &c., ("except her freehold property," disposed of by a contemporaneous codicil,) to *A*. The excepted freehold property was part of the subject of the power. Held, in consequence of the exception, that the residue of the property subject to the power passed.

A testatrix had ground rents of her own, and ground rents of which, under the will of her husband, she was tenant for life with power to appoint to her children. By her will, she gave a son an annuity, payable "out of my ground rents." The Court having held, on another clause of her will, that "my property" included the husband's also, came to the conclusion, that "my ground rents" also included the husband's.

Appointment to one of several objects of a power, in payment of a debt due to her from the appointor, held void.

An appointment was made to a person not an object of a power, with remainder to an object. The first appointment being void, it was held, that the second was not accelerated, but failed with the first.

Appointment to *A. B.* (an object of a power), to be settled for her separate use, and to be divided, at her death, amongst her children. The gift to the children being void, they not being objects, Held, that *A. B.* took for life only, and not an absolute interest ineffectually attempted to be cut down.

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ground rent in *Globe Fields*, and some other ground rents and property, which it is unnecessary to specify.

His widow *Ann Reid*, had property of her own, and amongst it some ground rents, but no freeholds. She made her will on the 12th of *February*, 1847, whereby, in pursuance of the power given by her husband's will, she gave and disposed of the whole of her own and her husband's property as follows:—She gave to the Plaintiff certain property of her own, "*likewise 10l. a year out of my ground rents.*" The whole "to be enjoyed by him during his life, and at his death to be equally divided amongst his children (if any)," but "if he die without issue, the whole of it shall return, in equal shares, to his then surviving brothers and sisters."

She then gave some of her husband's property to her sons *William* and *James*, for their lives, and afterwards to their children, and if they died without issue, to the surviving brothers and sisters.

She gave to her daughter *Ann* the house in *Goodge Street*, left by the testator, "*likewise the whole of the residue of my property of every description* (including the ground rents and the house in *Fitzroy Place*, *save and except my freehold property as disposed of by the codicil to this my will*) *leaving her my residuary legatee.* The whole of which property shall be settled upon her for her own whole and sole separate use, not subject to the debts or control in any way of any future or after taken husband." She then appointed two trustees "for the fulfilment of the same," and proceeded thus:—"The whole of the above left in trust for her use, to be divided, at her death, equally among her children, but if she should die without issue, it shall then return to her surviving brothers or the survivor of them, share and share alike."

On the same day, she made a codicil, whereby she gave to *James*, in addition to her husband's freehold in *Clerkenwell*, his ground rent in *Globe Fields* for life, and at his death, to his children; "but if he should die without issue, the whole should return to his sister *Ann Reid*, and in like manner, at her death, to her children. Should she die without issue, it shall then become the joint property of her brothers *George Reid* and *William Reid*, or the survivor of them."

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In consequence of the death, in 1848, of her son *William* without issue, the testatrix made a further codicil to her will of 1847, and she revoked the bequest given to him, and proceeded thus:—"And [I] hereby desire the same may be received by my daughter *Ann Reid*, in payment of money lent by her to me in my lifetime, until she has been paid up both principal and interest thereon at the rate of 5*l.* per cent. per annum, after which, the rent of the houses left to my said son shall be equally divided between her and her brothers, or the survivors or survivor of them, share and share alike."

The testatrix died in 1855.

This suit was instituted by the eldest son *George*, and now came on for hearing.

*Mr. Selwyn* and *Mr. Roberts* for the Plaintiff.

1. In regard to the testator's property, his widow, under the words "to be disposed of at her death amongst my children," had a testamentary power of appointment amongst such only of them as should be living at her death; and in default of appointment, there is a gift, by implication,

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implication, to the children; *Brown v. Higgs*(a); but restricted to those who survived her; for they alone were the objects of the power; *Walsh v. Wallinger*(b); *Winn v. Fenwick*(c); *Woodcock v. Renneck*(d); *Boyle v. The Bishop of Peterborough*(e). The survivors, therefore, take the unappointed property equally.

2. The appointment to *Ann* by the second codicil, "in payment of money lent by her to me" [the testatrix], is a fraud on the power, and is wholly void; *Daubeny v. Cockburn*(f); *Palmer v. Wheeler*(g); *Sugden on Powers*(h).

3. The appointment, in remainder, to grandchildren, is not within scope of this power, and all gifts dependent on them are void; but the prior partial gift to children remains unaffected; *Alexander v. Alexander*(i); *Robinson v. Hardcastle*(k); *Brudenell v. Elwes*(l); 2 *Sugd. on Powers*(m).

Mr. Lloyd and Mr. T. Stevens for *Ann*.

1. There is a gift, by implication, to the surviving children, in default of appointment.

2. The will of the widow raises a case of election, and all persons taking under the will must either give effect to every disposition made by the testatrix of the testator's property, or renounce the benefits given to them out of her own; *Whistler v. Webster*(n); *Blacket v. Lamb*(o).

3. The

(a) 8 Ves. 570.  
(b) 2 Russ. & M. 78.  
(c) 11 Beav. 438.  
(d) 4 Beav. 190; 1 Phillips,  
72.  
(e) 1 Ves. jun. 299.  
(f) 1 Mer. 625.

(g) 2 Ball & B. 18.  
(h) Page 207 (6th edit.).  
(i) 2 Ves. sen. 640.  
(k) 2 Term R. 241.  
(l) 1 East, 442; 7 Ves. 382.  
(m) Page 72 (6th edit.).  
(n) 2 Ves. jun. 367.  
(o) 14 Beav. 482.

3. The gift to *Ann* of "the whole of the residue of my property, except my freehold property," as disposed of by the codicil, includes the testator's residuary estate. It was her "property" in one sense of the word, for she was in the enjoyment of it as tenant for life. She had no freeholds, and the freeholds disposed of by the codicil, though called by her "my freehold property," really was part of the testator's estate. The exception, therefore, shews, that she was dealing with property subject to her power. She interpreted her meaning by the express exception, which "shews her understanding that it would have passed by those words," and "that express words were required to exclude it;" *Hotham v. Sutton* (a).

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4. The appointment to grandchildren being void, the appointment to the children remains absolute, for the attempt to cut it down fails altogether; *Carver v. Bowles* (b); *Stephens v. Gadsden* (c).

5. The ulterior limitations, after the void appointment to grandchildren, are not accelerated, but fail; there is no intestacy, everything undisposed of or ill appointed falls into the residuary gift to *Ann*.

*Mr. Boys*, for the representatives of *William*. All the children take in default of appointment, for the power is not to be exercised exclusively by will, as in the cases cited. Here the words creating the power are "to be disposed of at her death amongst my children." This would authorize an appointment by deed to take effect at her death, and therefore the objects taking by implication are the whole class of children, and not those only

(a) 15 Ves. 326.

(b) 2 Russ. & M. 301.

(c) 20 Beav. 463.

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only who survived the widow; *Casterton v. Sutherland* (a); *Grieverson v. Kirsopp* (b); *Faulkner v. Lord Wynford* (c).

Mr. *A. Bailey*, for the representatives of *John*. The words "at her death" refer to the period of enjoyment, and not to any qualification of the class.

*The MASTER of the ROLLS.*

I think that the power only applies to those who survived the widow, and that the appointment to the daughter to pay the testatrix's debt to her cannot stand. There are two points on which I wish to hear a reply: first, as to the question of election; and, secondly, as to whether the residuary gift to *Ann* includes the father's property.

Mr. *Selwyn*, in reply, argued, that the power did not authorize an exclusive appointment; and that, as no portion of the father's estate had been appointed to the Plaintiff, the appointments to the other children failed.

*The MASTER of the ROLLS* reserved the judgment.

*The MASTER of the ROLLS.*

April 26.

I think the effect of the will of the testator *George Reid* very clear. It is a gift of everything he has to his wife for her life, with a power to her to appoint it, by

(a) 9 *Ves.* 445.  
(b) 2 *Keen*, 653.

(c) 15 *Law J. (Ch.)* 8.

by will, amongst his children who shall then be living, as she might please; and in default of her making such appointment, there is an implied gift to his children.

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Mrs. *Reid* enjoyed the property during her life. She possessed considerable property of her own, not derived from her husband, and she made her will on the 12th of *February*, 1847. She executed a codicil on the same day as part of her will, and she executed a second codicil in 1848. She died in *April*, 1855, leaving three children surviving her. These three children are the Plaintiff *George Reid* (who is the eldest son and heir at law of the testator), *James Reid* and *Ann Reid*. They are the sole next of kin of the testator and testatrix, and also of *William Reid*, another child, who is mentioned in the will of Mrs. *Reid*, but who died before her. These three surviving children were alone the objects of the power, and any appointment to others is an appointment to persons who were not objects of it.

As I go through the will of Mrs. *Reid*, I shall dispose of the questions which arise on the construction of the particular words of the devises and bequests which have been argued before me.

As to the gift to the Plaintiff(a), the property there disposed of was her own and not derived from the testator, with this exception:—That small ground rents passed by his will to the testatrix, and it is a question whether the words “10*l.* a year out of my ground rents” are applicable solely to those which were the exclusive property of the testatrix, or whether they include

(a) See *ante*, p. 470.



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clude the ground rents derived from the testator. I shall reserve the consideration of this question (which, from the view I take of this case, has become one of considerable importance) until I come to consider the effect and construction of the residuary clause of the testatrix's will. But if the words "my ground rents" do not include the testator's ground rents, then, so far as this part of the will is concerned, the gift in favor of the Plaintiff for life, with remainder to his children, is perfectly good. If they do include such ground rents, then, to the extent of these small ground rents, this appointment in favor of the grandchildren is void, they not being objects of the power.

The will then contains a gift to *William*, who died in the testatrix's lifetime and another to *James* (a).

The property given to *James* was derived from the testator, consequently, the appointment of it to the children of *James Reid* is void, it being in favor of persons not objects of the power. It is true that the gift over to the surviving brothers and sisters is in favor of persons who were the objects of the power, but as this gift is subsequent to and dependent upon a gift that is void, I am of opinion this also must fail with the gifts to the children of *James Reid*.

The testatrix then goes on to give to *Ann Reid* (a) the whole of the residue of *her property*, and a question was raised, whether this bequest was not confined to the property which belonged exclusively to the testatrix, so as to exclude the property derived from the testator; but I think it must be held to include both.

It

(a) See *ante*, p. 470.

It is true that she uses the words "the whole of the residue of my property of every description," but the words in the parenthesis shew that the words "my property" included the property derived from the testator. The parenthesis is in these words, "including the ground rents and the house in *Fitzroy Place*, save and except my freehold property as disposed of by the codicil to this my will." This, therefore, excepts from "my property" some property which was clearly derived from the testator, and I concur in the correctness of the proposition expressed by Mr. *Lloyd*, that the generality of the description contained in the exception must be extended to the description contained in the general bequest. This is a rule founded on common sense, and scarcely requires the high authority of Lord *Eldon* to support it, which, however, is to be found in *Hotham v. Sutton* (a).

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The codicil referred to disposed of the testator's freeholds (b), and therefore this direction, excepting the testator's freeholds from passing under the description of "the whole residue of my property of every description," shews plainly the intention of the testatrix, that the general description would, in her view, have included the property derived from the testator, had it not been for the exception. The general description, therefore, includes all the property possessed by the testatrix, which was derived from the testator, except that excluded by this parenthesis and the codicil. The direction that it should, on the death of *Ann*, be divided equally amongst her children, is void, so far as it extends to property derived from the testator, and over which the testatrix had simply a power of appointment.

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(a) 15 *Ves.* 326.

(b) *See ante*, p. 471.

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It is contended that this gift over does not affect the gift to the daughter, that the residuary gift to the daughter is absolute, and that, afterwards and in derogation of this gift, there is a limitation in favor of her children, which being simply void, leaves that absolute gift to the daughter unaltered and unprejudiced.

This principle is no doubt perfectly correct, in all those cases to which it applies; but, in my opinion, it does not apply to the residuary gift contained in this will. I think that there is no gift to the daughter, except for her life. The testatrix gives the whole of her property to her daughter, without words of limitation or stating in what manner she shall take it, and then directs that this property is to be settled on her for her sole and separate use independent of her husband, and at her death to be divided amongst her children, and if she die without issue, there is a gift over to her brother. In my opinion, therefore, the daughter *Ann* takes no further interest than that which she is to derive under the settlement which is for life, and the gift over to her children being void, does not enlarge the previous gift to her. The gift over to her surviving brothers, in case she died without issue, is void, on the principle I have already expressed, because it is dependent on the failure of an appointment which is itself void.

The only other document I have to consider is the codicil which was executed in 1848 (a).

The question is, whether this appointment in favor of *Ann Reid* to pay a debt due from her to the testatrix can be supported? I am of opinion that it is  
void

(a) See *ante*, p. 471.

void as a fraud on the power: if supported, it would enable the donee of the power to sell to one of the objects of it an appointment of the substantial part of the fund in favor of that person. It was endeavoured to be argued, that it was merely a condition annexed to the appointment, which, whether the condition were void or not, would not affect the appointment itself; but I think this view of the case cannot be supported. It is not an appointment to the brothers and sister, on condition that the brothers paid the debt due from the testatrix to their sister, but it is a direct appointment to the daughter *Ann Reid*, until she is repaid the debt with interest at 5l. per cent. This, as I have stated, if supported, would enable the donee to make the appointment a matter of pecuniary profit to herself; it is, therefore, a fraud on the power, out of the execution of which the donee is not entitled to derive any pecuniary benefit.

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The gift over in favor of the daughter and the two brothers is also void, for the reasons I have already stated with reference to the other parts of the will, that is, it falls with the previous appointment, on the completion of which alone it is to take effect and which is itself void.

The effect of this construction of the codicil, which makes it wholly inoperative as an execution of the power contained in the testator's will, is this:—that unless the words "my ground rents," in the previous gift to the Plaintiff, includes those of the testator, the Plaintiff, the eldest son, takes nothing whatever as appointee, under the execution of the power by the will and codicils of the testatrix, and as the power of appointment is not an exclusive one, the appointments cannot

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cannot stand, unless something, however small, is appointed in favor of the Plaintiff. And if, as it is contended, this is not done, the whole would fail as an execution of the power of appointment.

Upon the whole, however, as the matter stands on the will and codicils of the testatrix, I am not of this opinion. I think I must give the same effect to the same words used by the testatrix in different parts of her will, unless there be something in the context wholly repugnant to this view. In the residuary clause, I have felt myself compelled to treat the words "the whole of the residue of my property of every description, including the ground rents, &c.," as including the property derived from the testator, and, therefore, as including the ground rents of the testator. I think I must give the same comprehensive meaning to the words "*my ground rents*," in the devise to the Plaintiff in the beginning of the will, which I do to the words "*my property*" in the residuary gift to the Defendant *Ann Reid*.

The result of this will be, that although the ground rents of the testator are extremely small and the interest of the Plaintiff in them, under this gift, in the will almost infinitesimal, still, as the statute against illusory appointments (*a*) applies to this will, having a retroactive operation on any power of appointment then *in esse* but afterwards to be executed, I am of opinion that the will of the testatrix is good, and operates as an execution of the power of appointment contained in the testator's will, so far as it appoints part of the property of the testator in favor of the Plaintiff and the Defendants *James* and *Ann Reid*, but  
that

(a) 11 Geo. 4 & 1 Will. 4, c. 46.

that it is void and inoperative, so far as it appoints any of this property in favor of the children of these persons.

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This, however, raises a question of election, and the persons who take benefits under the will, out of the exclusive property of the testatrix, cannot, in my opinion, retain those benefits and, at the same time, take such benefits under the will of the testator as they would be entitled to in default of appointment, to the extent that the appointment under the testatrix's will is bad.

The question of election would arise, equally, in case it should be held that the whole of the testatrix's will failed as an execution of the power of appointment, on the ground of nothing being appointed to the Plaintiff. If I held that the original word "my" did not include the ground rents of the testator, the only effect of this would be, that the clause would have a less extensive operation than it does in the way in which I regard it as an execution of the power, but the intention of the testatrix being plain, it is obvious that the legatees and devisees under her will cannot take those benefits and at the same time not allow her will to take effect on the rest of the property.

I am of opinion, therefore, that the will must be regarded as an execution of the power, to the extent it gives benefits out of the testator's property to the Plaintiff and the two Defendants, but inoperative so far as it attempts to extend those benefits to their children.

This will, I believe, dispose of all the points that  
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were argued before me, and the minutes must be prepared accordingly to carry these views into effect, which I am willing to express by declaration, if desired.

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ELLIS v. EDEN. (No. 2.)

April 29.

In June, a testator directed his bankers to purchase 1127 francs French Rentes for him. They entered the purchase in their books, but never transferred the amount into the testator's name; they had, however, sufficient Rentes to answer it, which they considered they held for the testator. In July following, the testator bequeathed "the annual rente of 1127 francs, inscribed in his name in the book of the public debt of France," to A. B. Held, that A. B. was entitled to 1127 Rentes, although the testator had none in his name, and although, on the balance of previous transactions in Rentes with his banker, he was entitled only to 708 francs in Rentes.

BY a codicil to his will, dated the 3rd of July, 1855, the testator Sir *Henry Ellis* (a) expressed himself as follows:—"I give and bequeath the annual rente of 1,127 francs inscribed in my name on the book of the £3 per Cent. of the Public Debt of France, together with the arrears thereof at the time of my death, to the trustees and executors appointed by my will, in trust to apply such rente of 1,127 francs in the maintenance and education of my said granddaughter *Sidonie* until she shall attain the age of twenty-one years, or marry under that age; and on my said granddaughter *Sidonie* attaining the age of twenty-one years, or on her marriage under that age, in trust either to transfer the Rentes to her, or convert the same into money, and pay the capital to be produced thereby to my said granddaughter absolutely," &c. &c.

The testator died in September, 1855.

An inquiry was directed, whether the testator, at the date of the codicil, had any French Rentes in his name, or in the names of any trustees for him.

It

(a) 23 Beav. 543.

It appeared that he had no Rentes in his own name, but that there were in the names of Messrs. *Rothschild*, his bankers, in trust for him, 708 Rentes, under the following circumstances :—

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Previous to *May*, 1855, the testator directed Messrs. *Rothschild* to purchase 1,081 French Rentes for him, and on the 7th of *May* to sell 1,500 like Rentes. On the 23rd of *June*, he directed them to purchase for him 1,127 Rentes. None of these sums were actually transferred into or from the name of the testator, but the transactions were entered in Messrs. *Rothschild's* books, according to their custom, in order to facilitate the future disposal of such securities in the absence of the parties. Nor were the 1,081 Rentes purchased set off against the 1,500 sold.

Messrs. *Rothschild* always held a large amount of such Rentes in their names, and, according to the custom between themselves and the testator, they considered that they held a corresponding portion of them for the testator, and to be accounted for and transferred to him when required, subject to any lien of the firm.

The testator, by letter to Messrs. *Rothschild*, had directed the interest of the Rentes “last purchased for him” (meaning, no doubt, the 1,081 Rentes) to be carried to the account of his son.

The question now raised was, as to the right of the Defendant *Sidonie Ellis* to the French Rentes.

Mr. *R. Palmer* and Mr. *Speed* on behalf of the legatee. The 1,127 French Rentes were not, it is true, inscribed in the testator's name; the description of them



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was inaccurate, but the subject intended to be given is beyond doubt, namely, the 1,127 which he had, on the 23rd of *June*, directed to be purchased. The case comes within the rule "*Falsa demonstratio non nocet*;" *Williams v. Williams* (a); *Roper on Legacies* (b), and the legatee is entitled to the 1,127 francs. The 419 Rentes, due to Messrs. *Rothschild* on the balance of the old account, cannot be set off against them, so as to reduce the legacy to 708.

Mr. *Jessel* for the executors. There can be no doubt that the testator intended the particular sum of 1,127 francs which he had directed Messrs. *Rothschild* to purchase for him, but the gift was of a specific fund inscribed in his name, and if it did not exist at the death, the legacy failed by ademption. The Court cannot enter into the consideration, whether the legacy has or has not ceased to exist by an intention to adeem on the part of the testator; *Barker v. Rayner* (c). Intention has nothing to do with a question of ademption; if the thing given does not exist *in specie* at the death, the gift of it fails, even against the intention of the testator. Here the gift was specific, and it did not exist at the testator's death. If it had ceased to exist by any wrongful act of the bankers the case would have been different, but here the matter was conducted according to the ordinary mode of dealing between the parties.

The testator himself could not have claimed, as against Messrs. *Rothschild*, any larger amount of Rentes than the balance of 1,127, after deducting the 419, or 708 francs, nor can the legatee.

*The*

(a) 2 Bro. C. C. 87.

(b) Page 300 (4th edit.)

(c) 5 Madd. 208.

*The MASTER of the ROLLS.*

I am of opinion that the testator, as between himself and Messrs. *Rothschild*, had this sum of 1,127 francs at his death, and, although there were unsettled accounts between them, the testator was entitled to this sum, his bankers having been instructed to buy it, and they having written to say they had purchased it. If this sum existed at the date of the codicil, nothing has been done since to annihilate it. I am of opinion, that for the purposes of the will it exists, and that, therefore, the granddaughter is entitled to it, and to be indemnified out of his estate against any claim which Messrs. *Rothschild* may have upon it.

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IREDELL v. IREDELL. (No. 2.)

THE testatrix, by her will, dated in 1852, made the following bequest :—

“ I give and bequeath unto my said sons *James Shrubb Iredell* and *Francis Macartney Iredell*, and the said *Philip Hall Palmer*, their executors and administrators, the sum of 5,280*l.* £3 per Centum Consolidated Bank Annuities, which has been purchased by me and now stands in the books of the Governor and Company of the Bank of *England*, in the names of myself, my said son *James Shrubb Iredell*, the said *Philip Hall Palmer* and my said son *Lestock Wilson Iredell*,

May 3, 4.

Under a bequest in trust for all the sons and daughters of A., B. and C. (who were living) who shall attain twenty-one, it was held, that the class was not to be ascertained on the first of the class attaining twenty-one, in consequence of the will containing a power of maintenance and advance-

ment, whether they “ shall or not” have attained twenty-one, and notwithstanding the liability of the share to be lessened by the subsequent addition to the class entitled to the entire fund.

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*Iredell*, and also the sum of 700*l.* like annuities, which has been purchased by me," and other sums which she specified, upon the trusts hereinafter expressed, "that is to say, as to the said sum of 5,280*l.* £3 per Centum Consolidated Bank Annuities, and the dividends and annual produce thereof, *upon trust for all my grandchildren* (sons and daughters of my said three sons respectively), *whether born in my lifetime or after my death, and who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or marry with the consent of their respective fathers, if then living, which shall first happen, equally to be divided between my said grandchildren, if more than one, share and share alike as tenants in common, and if there shall be only one such grandchild, then upon trust for that one grandchild, his or her executors, administrators or assigns.*"

She gave the 700*l.* Stock upon trust for her four granddaughters by name, if and when they should attain twenty-one, or marry under that age with the consent of their fathers, with survivorship, but if none of them should live to acquire a vested interest, then upon the trusts declared of the 5,280*l.* £3 per Cents. She also gave other funds over in a similar manner.

The will contained provisoes in the terms following:—"Provided always, and I do hereby declare and direct, that it shall be lawful for the trustees or trustee for the time being of any trust moneys, stocks, funds or securities, or any share or shares of any trust moneys, stocks, funds or securities, or any property or benefit to which any grandchild or more remote issue of mine shall, for the time being, be entitled, either absolutely, or presumptively, or in expectancy, under this my will or the declarations or provisions therein contained, or any of them, from time to time, with the  
 consent

consent in writing of the persons or person, if any, for the time being entitled to the dividends, interest or annual produce thereof respectively, to pay, apply and dispose of any part, not exceeding one-half of the capital, of the trust moneys, stocks, funds and securities, shares or share, property or benefit, to which any and every such grandchild or more remote issue shall be so as aforesaid entitled, in, for and towards the advancement or preferment in the world, or in marriage, or otherwise for the benefit of such grandchild or more remote issue, whether such grandchild or other issue, in the instance of males, shall or not have attained the age of twenty-one years, and in the instance of females shall or not have attained that age or have married with such consent as hereinbefore mentioned, *and notwithstanding any liability of the share of such grandchild or other issue in the said trust funds, respectively, to be lessened in amount by the subsequent addition to the class entitled to the entire trust fund*, or any aliquot part thereof, such advancement to be made out of such particular fund in which such grandchild or other issue shall be entitled to a share, presumptive or otherwise, and in such manner in all respects as such trustees or trustee shall, in their or his absolute and uncontrolled discretion, think fit. And I do hereby declare my will to be, that my said trustees or trustee do and shall pay and apply the whole, or such part as they or he shall think fit, of the interest, dividends and annual produce of all or any of the trust moneys or shares therein, to which any such grandchild or more remote issue of mine shall be presumptively or absolutely entitled as aforesaid, for and towards the maintenance and education of such grandchild or more remote issue as aforesaid, in the meantime and until such his, her or their then expectant or vested shares shall become payable, whether such grandchild or other issue, in the instance of males, shall or not have attained

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attained the age of twenty-one years, and in the instance of females, shall or not have attained that age or have married with such consent as aforesaid, and notwithstanding any liability of any share of such grandchild or other issue to be lessened in amount as hereinbefore mentioned, and notwithstanding the father of any such grandchild or other issue, respectively, may be fully able to maintain them, and notwithstanding the marriage of any such female grandchild or other issue, without prejudice nevertheless to any preceding trust declared thereof; and do and shall, during such suspense or absolute vesting as aforesaid, accumulate all the residue thereof, if any, in the way of compound interest, by investing the same, and all the resulting income and produce thereof, from time to time, in or upon any such stocks, funds and securities as are in this my will mentioned, for the benefit of the person or persons who, under the trusts herein contained, shall become entitled to the principal fund from which the same respectively shall have proceeded, with power for the said trustees or trustee for the time being to resort to the accumulation of any preceding year or years, and to apply the same, as to such trustees or trustee shall seem meet, towards the maintenance and education of the grandchild or grandchildren or other issue who shall, for the time being, be presumptively or otherwise entitled to the same respectively, in like manner as such accumulations might have been applied, under the power hereinbefore contained, in case the same accumulations had been interest, dividends or annual produce arising from the original trust fund, in the year in which the same shall be so applied for maintenance and education."

The testatrix died in 1853.

*James Shrubb Iredell*, the son of the testatrix, had  
four

four children living at her decease, all of whom were now infants; he had had no other issue born since the testatrix's decease.

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*Francis Macartney Iredell* had six children living at the decease of the testatrix, all of whom were infants except the Plaintiff *Louisa Ann*, who had since attained her age of twenty-one years; and he had had no other issue born since the testatrix's decease.

*Lestock W. Iredell* never had any issue.

This suit was instituted by *Louisa Ann Iredell*, who submitted that she became entitled, on her attaining the age of twenty-one years, to one-tenth part of the fund representing the sum of 5,280*l.* £3 per Cents., and that no child who might hereafter be born to the three sons, *James*, *Francis* and *Lestock* respectively, would be entitled to participate therein. That, at all events, the Plaintiff was entitled to be let into the immediate receipt of the annual income arising from one-tenth part of the fund, during the lives of the testatrix's three sons and the lives and life of the survivors and survivor of them, and to an equal share with the other grandchildren of the testatrix attaining vested interests under her will, in the capital of the same funds, in reversion expectant on the decease of such survivor.

Mr. *R. Palmer* and Mr. *C. C. Barber*, for the Plaintiff. When one grandchild attained twenty-one, the class was ascertained, and the 5,280*l.* Stock then became immediately divisible. If it were otherwise, it could not be distributed until the deaths of the three sons, a most inconvenient consequence. But the authorities on the point are conclusive. In *Andrews v. Par-*  
*tington*

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*tington* (a) there was a bequest of a residue to all the children of A., the daughters' shares to be paid at twenty-one or marriage, the sons' at twenty-one or to be sooner advanced for their benefit, with survivorship and interest for maintenance; it was held, that the fund became divisible among the children in *esse* at the time the eldest attained such age. The same rule was recently followed in *Hagger v. Payne* (b). There the testator gave his residue to a class of children who should attain twenty-one; it was held, that children born after one of the class had attained twenty-one were excluded and did not participate in the fund. In that case, the Court stated the rule in these words:—"The third principle,—that where a legacy is given to a class at twenty-one, as soon as one of the class attains twenty-one, the fund becomes distributable, and by reason of the fund being then divisible, persons of that class afterwards coming into *esse* are necessarily excluded."

Mr. *Osborne* in the same interest.

Mr. *Lloyd* and Mr. *Jolliffe*, for the executors. All the grandchildren are included in the class; *Leake v. Robinson* (c). The clauses for maintenance and advancement clearly shew that all the grandchildren, whenever born, were to participate in the fund. In *Mainwaring v. Beevor* (d), there was a residuary gift to trustees, with a direction, as soon as all and every the grandchildren, the children of the testator's two sons, should have attained their ages of twenty-one, to pay and divide the trust fund unto and amongst all and every his said grandchildren. This was held to be a gift

(a) 3 Bro. C. C. 401.  
 (b) 23 Beav. 474.

(c) 2 Mer. 363.  
 (d) 8 Hare, 44.

gift for the benefit of all the children of the testator's two sons, and not distributable upon the youngest grandchild for the time being attaining twenty-one, but that on attaining twenty-one, the grandchildren were entitled to the interest on their presumptive shares until another grandchild should be born. The Vice-Chancellor there said :—" If grandchildren born after the death of the testator are to be admitted, there does not appear to be any reason for excluding a grandchild born or to be born in the lifetime of either of the testator's sons."

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*The MASTER of the ROLLS.*

If the case rested on the first clause, I should have had no doubt on the subject. I should, in that case, have thought that the case was within the rule of *Andrews v. Partington*. I should have held, that on a grandson attaining twenty-one or on a granddaughter marrying with consent, the class would be ascertained and the distribution would take effect. But I see no means of getting over the clause for maintenance and advancement.

The testatrix authorizes the trustees of any funds to which any grandchild may be "either absolutely or presumptively" entitled, to apply the capital in advancing a grandchild, "whether such grandchild or other issue, in the instance of males, *shall or not have attained the age of twenty-one years*;" and she gives a direction for maintenance in similar terms. The testatrix contemplated, therefore, that these clauses should apply to cases after a child had attained twenty-one or married, that is, after the very period at which, according to the principle of *Andrews v. Partington*, the child would be entitled to have payment of his share.

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The clause also proceeds, "and notwithstanding any liability of the share of such grandchild to be lessened in amount by the subsequent addition to the class entitled to the entire trust fund;" that is, an addition to the class subsequent to the time of their advancement, which may be before or after a grandchild shall have attained the age of twenty-one years. The class is, therefore, liable to become increased either before or after a grandchild attains twenty-one.

The advancement and maintenance clauses would be wholly unmeaning if they applied only to a child who was entitled to dispose of his share of the capital itself. It is clear, therefore, that until after the possibility of children has ceased, the maintenance clause is to have effect, whether a grandchild has attained twenty-one or married or not, and notwithstanding the liability of a "subsequent addition to the class entitled."

Therefore, unless I strike out the clause for maintenance and advancement, I cannot hold that the class and the number are to be ascertained on the first attaining twenty-one; but the Plaintiff is entitled, in the meantime, to the interest of her presumptive share.

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## HOGGARD v. MACKENZIE.

**M**ESSRS. *Macdonald* carried on the business of lace manufacturers, &c. at *Glasgow* in *Scotland*; they also had an establishment in *London*, for supplying their goods to wholesale customers. In *May*, 1856, they appointed the Plaintiff, Mr. *Hoggard*, their agent and manager in *London*, at a salary of 300*l.* a year.

In *December*, 1856, Messrs. *Macdonald* determined to supply their goods in *London* to retail houses, and they then appointed the Plaintiff to be their *London* manager and assistant, at a yearly salary of 800*l.*

The *London* business was carried on in *St. Paul's Church-yard*, upon premises leased by Messrs. *Macdonald* in their own names. The Plaintiff had the control and management of the business; he engaged the servants of the establishment, drew cheques, and kept the key of the house containing the goods.

It had been arranged, that Messrs. *Macdonald* should draw bills upon the Plaintiff against the goods sent from *Scotland* to *London* for sale, and to secure the Plaintiff, Messrs. *Macdonald* had written him the following letter:—

“*Glasgow*, Jan. 12th, 1857.

“Mr. *George Hoggard*.

“Dear Sir,—It is expressly understood and agreed between us, that you are to have a general lien upon all goods

*May* 5, 6. A Scotch firm had a branch in *London*, which was wholly conducted by an agent and manager at a salary, but in their name. By contract, he was to have a lien on goods consigned to him for bills accepted by him for the firm. The firm became bankrupt in *Scotland*. Held, that the goods under the manager's control at the time were within the “order and disposition” of the bankrupts, and passed to their assignees unaffected by his lien.

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goods which we may consign to you for sale, and upon all goods, bills, notes and cash which may come into your hands on our account, in order to cover you from all liability which you may incur as our agent, either in respect of bills drawn by us upon and accepted or endorsed by you or otherwise."

Messrs. *Macdonald* stopped payment in *London*, and on the 11th of *November*, 1857, a sequestration issued against them in *Scotland*, according to the Scotch Law of Bankruptcy. The Defendant *Mackenzie* was appointed trustee of the sequestrated estate for their creditors.

At the time of the Scotch bankruptcy, twenty bills of exchange, accepted by the Plaintiff for Messrs. *Macdonald*, for sums amounting to 14,734*l.*, were outstanding. The Plaintiff had in his possession or custody goods of that firm, which had been sent by them to *England*, to an amount far exceeding the amount of the bills, and on these he claimed a lien, by virtue of the letter of the 12th of *January*, 1857, for securing him against the bills. This claim being disputed by *Mackenzie*, *Hoggard* filed this bill against him, praying a declaration of his right to a lien on the goods, and for consequential directions necessary to give effect to it.

The Defendant insisted, that the goods were in the order and disposition of the firm at their bankruptcy, and passed to his assignees.

A Scotch advocate, in his evidence, expressed his opinion, that the Scotch courts would hold, that the goods upon the premises in *St. Paul's Church-yard* were in the order and disposition of Messrs. *Macdonald* at their bankruptcy. He further said, "Under the act  
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of parliament 19 & 20 *Vict.* c. 19, s. 73, all the property which previously belonged to the bankrupts and all rights previously competent to all their creditors became absolutely vested in the above-named Defendant, as trustee of their sequestrated estate. I am, therefore, of opinion, that by the Scotch common law, the goods and merchandize became vested in the Defendant, for the benefit of the general creditors of the bankruptcy, discharged of the Plaintiff's claim to lien thereon, and quite as effectually and in all respects similarly to the operation of the English bankruptcy laws respecting property in the order and disposition of English bankrupts, with the provisions of which laws I am familiar. The rule of the common law of *Scotland*, in regard to the matter of reputed ownerships, is thus stated by Mr. *Bell* (a recognized and eminent authority in *Scotland*) in his *Commentaries on Commercial Law* (a), as follows:—The rule may be stated in this proposition:—that where one is, unnecessarily or by the collusion or gross negligence of the true owner, permitted to give himself an appearance to the world as if he were proprietor of goods and wares not belonging to himself, and thus, by exercising acts of ownership and by holding a possession seemingly uncontrolled, his creditors will be entitled to proceed against the goods, as if they really belonged to him. In order to make property liable for the debts of the possessor, not being the true proprietor, the possession should be accompanied by that uncontrolled power and disposal of it which belongs to an owner. In *England*, it has this effect by the statute; in *Scotland*, such possession will have the same effect, and independently of the aid of statute on the one hand, or of any supposed vestage of property (as in cases of sale *rententâ possessione*) on the other.”

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(a) Page 519 (*Shaw's Edition*).

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The case now came on on notice of motion for a decree.

Mr. *Bagshawe* and Mr. *Bagshawe*, junior, for the Plaintiff. The doctrine of "order and disposition" is inapplicable to this case, for there must be a possession by the bankrupt, "by the consent and permission of the true owner." Here the true owners were the bankrupts, but qualified by the Plaintiff's right of lien over the property, and which was under his absolute control. The Plaintiff was incapable of consenting to the bankrupts' retaining the goods.

The case is not affected by the Scotch law, for the English contract for lien cannot be affected or destroyed by the laws of *Scotland*. Property in the order and disposition of bankrupts does not vest in the assignees; there is only a right to sell, which must be exercised before any property passes. They cited *Freshney v. Wells* (a); *Hawthorn v. The Newcastle Railway Company* (b); *Ex parte Pemberton* (c); *Ex parte Waring* (d); *Quartermaine v. Bittlestone* (e).

Mr. *R. Palmer*, Mr. *Selwyn* and Mr. *Giffard*, for the Defendants. The Scotch bankrupt law is similar to the English as to order and disposition. The possession of the Plaintiff at the time of the bankruptcy, was the possession of the bankrupts; for the possession of a servant is that of his master, as the possession of an agent is that of his principal. The goods in question were in the order and disposition as well as in the actual possession of the bankrupts, and they, therefore

(a) 26 *Law J. (Exch.)* 129.(b) 3 *Q. B.* 734, n.(c) 1 *Deacon*, 421.(d) 19 *Ves.* 345.(e) 22 *Law J. (C. P.)* 105.

therefore passed under the bankruptcy to the Defendant.

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They cited *Jackson v. St. Irvin* (a); *Toussaint v. Hartop* (b); *Stafford v. Clark* (c); *Bartlett v. Bartlett* (d); *Edwards v. Harben* (e); *Wordall v. Smith* (f).

Mr. *Bagshawe*, in reply. The cases cited apply to the simple possession of a servant of the goods of his master, unaffected by any personal rights of such servant; but here it is admitted that the Plaintiff's possession was accompanied by a right of lien, to which the cases do not apply.

*The MASTER of the ROLLS.* I will dispose of this to-morrow.

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*The MASTER of the ROLLS.*

I am of opinion that this case depends entirely upon the question of possession, and that upon it depends the question of lien. The effect of the evidence is, that the possession was that of the bankrupts, and although I have striven to come to an opposite conclusion, on account of the position in which the Plaintiff is placed, yet I am of opinion, that I cannot, consistently with the settled principles affecting these matters and with the law of the Court, do so.

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(a) 2 *Camp.* 48.

(b) *Holt* (N. P. C.), 335.

(c) 1 *Cer. & P.* 24, 403.

(d) 1 *De Gex & Jones*, 127.

(e) 2 *Term R.* 587.

(f) 1 *Camp.* 332.

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The state of the case seems to have been this:—Messrs. *Macdonald & Co.*, who carried on business in *Glasgow*, were desirous of extending their retail trade in *London*. They appointed the Plaintiff, who seems to have been an extremely active and useful agent, with a salary of 800*l.* a year, to manage the whole business there. He managed it accordingly, and the persons engaged in it were dependent upon him; but the establishment in *London* remained in the possession of the bankrupts, and he was only the servant of the firm at *Glasgow*, whether agent or not is not a matter of importance. Practically, he was merely the servant, and was paid by them a large salary for his valuable services in conducting their business in *London*. It would have been a different thing, if the goods had been consigned to a separate and independent firm or establishment, for the purpose of conducting the business for them, in which case the possession would have been the possession of the consignee. But, in this case, the goods were never out of the possession of the consignors, they were always the property of Messrs. *Macdonald*. Such being their relative situation, Messrs. *Macdonald* enter into a contract with the Plaintiff, that he shall have a lien upon all the goods in his possession, for the purpose of indemnifying him against his liability incurred by accepting bills drawn by them. I accede to the argument of Mr. *Bagshawe*, that this was a perfectly good and valid contract, but that fails in convincing me that the Plaintiff is right, and for the reasons I am about to state. The questions as to “order and disposition,” and as to lien, are perfectly distinct. The former really depends on the possession of the goods; if they be in the bankrupts’ possession at the time of the bankruptcy, the question of “order and disposition” arises; but if they be in the possession of a third person, then arises the question, whether,

whether, as against the assignees of that person, he has any lien on them by contract or otherwise. The question of lien only properly arises in such cases when the goods are sent to a stranger, when the possession is completely taken away from the bankrupts, although the consignee may be their agent.

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All the cases I am aware of establish this, viz. That where the goods are left in the possession of the bankrupts, unless there be something, such as a bill of sale or the like, which actually alters the possession of the bankrupts to the purchaser, or to that of the person who claims a lien upon them, the possession till then remains the possession of the bankrupts and the goods are in their order and disposition, as the reputed owners thereof.

In this case, it was argued, that if the lien was not illegal, the Plaintiff had a good lien as against the bankrupts, and that he had done every thing that he could to obtain possession, consistently with the terms of the contract, and that consequently, he was to be looked upon in the same situation as if the possession had actually been altered. If that be so upon the facts, then, in my opinion, the consequence is, that the Plaintiff entered into a contract, the necessary effect of which was, that in case of the bankruptcy of his principals, his lien became valueless and disappeared. Upon their getting into difficulties he might possibly have said he would remove the goods from their place of business to some warehouse of his own, and so have altered the possession. I express no opinion on that, but I feel satisfied of this, that as long as the goods remained in the warehouse in *London*, in the name of the bankrupts, and at their

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establishment





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establishment carried on entirely by their servants, although they were in the actual, and if I may so express myself, in the corporeal possession of the Plaintiff, still that possession was the bankrupts', and that as long as they remained there, he could not alter that position. I assume that he had a right of turning away any person who had charge of them, that he had the key and might do as he pleased with it, and in point of fact, that he had the absolute command and control over them physically, still I have no doubt, that as long as the goods were there, they were in the possession of the bankrupts, and being in their possession, they were in their order and disposition, and that they must pass to the assignee.

My opinion is, that this question could not have well been determined without the authority of the Court, and I would suggest, whether it would not be better to take a declaration instead of simply dismissing the bill.

The costs of all parties must be paid out of the fund.

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1858.

## MARSHALL v. WATSON.

**T**HE Plaintiff and Defendant were joint proprietors of two newspapers, called *The Northern Daily Express*, and *The Northern Weekly Standard*, which they carried on upon the terms of a partnership deed, dated in 1856. The Plaintiff had paid the Defendant a considerable sum for his seven-eighths of the concern.

Disagreements occurred, and on the 31st of *August*, 1857, the Plaintiff gave to the Defendant notice of dissolution, on the ground of an alleged violation of some of the conditions of the partnership deed. A discussion and correspondence then took place, and ultimately, on the 17th of *November*, 1857, the Defendant agreed to purchase the Plaintiff's interest for 3,150*l*.

The Defendant having delayed completing his contract, this bill was filed on the 23rd of *January*, 1858, for specific performance.

The contract for purchase being still incomplete, the Defendant, without the consent of the Plaintiff, had caused to be printed for publication a prospectus of a projected company, called *The Northern Daily Express Newspaper Company (limited)*, and which contained statements of the profit and loss, &c. of *The Northern Daily Express*, and *Northern Weekly Standard*, for the months of *January* and *February*, 1858. In this prospectus, the Defendant appeared to be the promoter of the projected company, and he thereby proposed to transfer

*April* 28. Proprietors of a newspaper dissolved partnership, and one of them agreed to purchase the whole. Before the completion and pending a suit for specific performance, the purchaser published statements as to the profits and loss of the paper, in order to establish a company to carry it on. A motion for an injunction to restrain him was refused. The Court will restrain a purchaser from doing acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property.

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transfer the entire proprietorship in the two newspapers to such company. The Defendant had also prepared a printed form of application for shares in the company.

A motion was now made for an injunction, to restrain the Defendant from printing and publishing the form of application for shares in the projected company, and the prospectus, "and also from publishing any other document or documents (whether printed, written, or of any other nature) having, or purporting to have for its or their object, to affect, in any manner whatsoever, *The Northern Daily Express*, or *The Northern Weekly Standard*, or either of them, or the proprietorship thereof, without the consent of the Plaintiff first had thereto, and from doing any other act, whereby the interest or property of the Plaintiff in *The Northern Daily Express* and *The Northern Weekly Standard*, or either of them, might be in any manner injured or affected.

The Plaintiff, in his affidavit, stated, that the prospectus and the form of application for shares were, in his opinion, calculated to do irreparable damage to the interests of the two newspapers, by throwing unnecessary and improper discredit on the circulation, and he believed that thereby his interest therein would be seriously damaged, and the value of the two newspapers materially depreciated.

The affidavits in opposition denied that the acts complained of would produce any damage to the newspapers. The Defendant also said, "it is of the utmost importance to me that I should be enabled to proceed with the publication of the prospectus, by means of which I hope to raise the funds requisite to complete  
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the purchase, and in which proposed company I intend to take a very large interest."

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Mr. *R. Palmer* and Mr. *A. E. Miller*, in support of the motion, argued, that the Defendant, who had not paid his purchase-money, ought not to be allowed to do any act which might affect or prejudice the circulation and value of the newspapers, or to publish the accounts, which might be productive of irreparable damage, by disclosing to the public and to the proprietors of rival newspapers the secrets relative to the undertaking. They referred to *Echloff v. Baldwin (a)*.

Mr. *Smale*, for the Defendants, was not heard.

*The MASTER of the ROLLS.*

This is a very peculiar case. Two gentlemen entered into a partnership to carry on a newspaper; they cannot agree, and have arranged to dissolve. The Plaintiff, who has agreed to sell his share to the Defendant, files this bill for the specific performance of the contract, and, pending the suit, the purchaser, endeavouring to create a joint-stock company to carry on the newspaper, has published advertisements, containing the accounts of the newspaper and the extent of its circulation; and this application is made for an injunction to restrain those acts.

I do not understand on what principle I could say, that a person, who has agreed to purchase a share in a newspaper, may not induce other persons to join him in carrying it on, or why he may not induce many others to join him in forming a company for that purpose. If he

(a) 16 Ves. 267.

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he be entitled to do that, he is entitled to use all the necessary means for that purpose, and if he may state the particulars to his friends, I do not see why he cannot publish them to the world, or why he is to be restrained from doing so. Where a purchaser is doing acts in the nature of waste and destruction to the property purchased, the Court will restrain him from doing so (a), and I should prevent one partner from doing an intentional serious injury to his co-partner, as if he were taking proceedings to depreciate the partnership property. But I am at a loss to see on what ground I could restrain one partner, who has become the purchaser of the whole concern, from making a statement of this kind as to his own affairs.

I once obtained an order to prevent a clerk, who had improperly obtained accounts, from publishing them (b) to the prejudice of the person from whom he had obtained them ; and I have myself placed a person under terms not to use documents, of which he has obtained the production, except for the purposes of the suit, and have forbidden him to make them public in any way (c).

But those cases do not apply to the present. There has been a disagreement between the partners, and the one who has bought the business is desirous of getting other persons to unite with him in carrying it on, and for that purpose, has furnished them with information relating to it. I cannot say that he is not entitled to do so, and I must refuse the motion (d).

(a) See *Crockford v. Alexander*, 15 Ves. 138.

(b) *Tipping v. Clarke*, 2 Hare, 393; *Morison v. Moat*, 9 Hare, 241.

(c) *Williams v. The Prince of Wales Life, &c. Co.*, 23 Beav. 338.

(d) See *Cotton v. Horner*, 5 Price, 537.

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## WHITE v. TURNER.

**T**HE testator, by his will, made in 1854, bequeathed certain leaseholds to his son *John Alvey Turner*, other leaseholds in trust for the separate use of his daughter *Emma*, the wife of *Stephen Charles Taylor*, and other leaseholds to trustees, in trust for the separate use of his daughter *Elizabeth Mary Ann*, the wife of *George Fuller*. And the testator thereby declared and directed that the houses bequeathed by him to his son *John Alvey Turner* should stand charged as a security to his trustees for the payment or satisfaction of the moneys that should be due to him from his son *John Alvey Turner* at the time of the testator's decease, and that the houses bequeathed by him to his daughters *Emma Taylor* and *Elizabeth Mary Ann Fuller* should respectively stand charged in like manner with the moneys which should be due to the testator from their husbands respectively at the time of the testator's decease, as thereafter mentioned.

The testator also gave his residuary estate to the Plaintiffs, upon trust as to one-third for his son *John Alvey Turner* absolutely, as to another one-third for the separate use of his daughter *Emma Taylor*, and as to the remaining one-third for the separate use of his daughter *Elizabeth Mary Ann Fuller*. And in case of their death in his lifetime, he gave their shares to their issue. And the testator provided, that the residuary bequest to each of his three children and their respective issue was made by him altogether subject to the provision thereafter contained for the *adjustment and payment* of

May 6.

By his will, the testator divided his property between his son and two married daughters, and he declared, that the debts due to him from his son and his two sons in law should be "paid or accounted for to his executors," before his children should receive any part of his estate. By a codicil, he cut down his son's interest to a life estate, and gave interests in share to his wife and children. Held, that the son was not bound to pay his debts for the benefit of his wife and children, but only to bring the amount into hotchpot as regarded his two sisters.

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of the respective debts that should be due to him from his son *John Alvey Turner* and his two sons in law *Stephen Charles Taylor* and *George Fuller*, respectively, at the time of his decease. And after reciting that his son *John Alvey Turner* was then indebted to him in the sum of 1,279*l.*, 12*s.*; and that his son in law *Stephen Charles Taylor* was indebted to him in the sum of 1,403*l.*, 16*s.*; and that his son in law *George Fuller* was indebted to him in the sum of 400*l.*, the testator did thereby declare that those debts "*should be paid or accounted for* to his executors after his decease," with interest, before his children or sons in law, respectively, or their respective issue, should receive any part or share of his houses or estate and effects.

And the said testator thereby also declared, that the Statute of Limitations, or any act or acts of bankruptcy or insolvency whatever, past or future, by any of those so indebted, or to become indebted to him, should not operate to alter or affect the foregoing provision, with reference to their debts *being paid or accounted for, or reckoned against* them, prior to their taking any part or share of his said houses or estate and effects.

The testator made a codicil to his will, bearing date the 28th day of *August*, 1856, in the words following:

"Whereas I have, by my will, given and bequeathed certain leasehold property and a share of my residuary estate and effects unto or for the benefit of my son *John Alvey Turner*, in manner therein mentioned, now I do hereby give and bequeath the said leasehold property and the share of my residuary estate and effects so appropriated to my son *John Alvey Turner* unto *George Francis White* and *William Smith Kendall*,  
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the trustees of my said will, their executors, administrators and assigns, to hold the same, respectively, upon trust for my said son *John Alvey Turner* during his natural life, or until he shall become and be declared a bankrupt, or any execution shall issue against him or his lands and tenements, goods and chattels, so as to affect his interest in the said property, in case this present provision had not been made, or until he shall take the benefit of any Act of Parliament for the relief of insolvent debtors, whichever shall first happen; and in case of the decease of the said *John Alvey Turner*, or in either of the other cases above mentioned, whichever shall first happen, the said life interest of the said *John Alvey Turner* shall cease and determine, in favor of the wife of the said *John Alvey Turner*, in case she shall be then living, but in case there shall be no wife of the said *John Alvey Turner* then living, my said leasehold property and the share of my residuary estate and effects shall go to and equally between any children whom he may leave him surviving, who shall live or shall have lived to attain the age of twenty-one years."

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The testator died in 1856.

At his death, the debts from his son and sons in law remained unpaid. Mr. *Taylor* had been bankrupt in 1848, and obtained his certificate, and the testator's debt was provable under it, but he had not proved it.

This bill was filed by the executors for the administration of the estate, doubts and difficulties having arisen on the construction of the will and in the administration of the estate.

The principal question was, whether the son was bound to pay his debt to the executors, so that the amount



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amount of it would become subject to the trusts of the codicil in favor of himself, his wife and children.

Mr. *W. Pearson* for the Plaintiffs.

Mr. *R. Palmer* and Mr. *Baggallay* for the Defendant *John A. Turner*. By the will, the son took an absolute interest, and his debt would merely have to be deducted from his share. The object of the testator was to create an equality between his children, by making them bring the amount advanced by him to the son and sons in law into hotchpot. On the will, taken by itself, the son would have merely taken his debt as part of his share.

The codicil settles the same share of the testator's estate which would have been payable to the son under the will. The son therefore is not bound to pay the debt at all, but it must be taken in reduction of the amount of the share to which he, his wife and children are entitled.

Mr. *C. Browne* for Mrs. *Turner* and her children. The debts must be "paid" to the executors before the children receive any part of the residue, and they are charged on the leaseholds. The amounts when received are to be held on the trusts of the will. It is also a question whether the debts are charged on the *corpus* or on the son's interest only.

Mr. *Henry Waller* for other parties.

*The MASTER of the ROLLS.*

I am of opinion that the testator does not mean that the debt of the son is to be settled for the benefit of the wife and children.

The effect of the will is this:—The debt is to be treated as paid up for the purpose of the division of his estate. All these debts are added to the estate, and the debts of each are to be treated as part of the share of each paid up. Thus, if the estate, including those debts, should amount to 9,000*l.*, each would be entitled to 3,000*l.*, minus the amount of his debt. I also think that the share of the son mentioned in the will is the same share of the son which the testator speaks of in the codicil. He should have stated, that the debt of the son was to be settled on his wife and children, if he had meant it.

I am of opinion that only the balance is to be settled on them, after deducting the debt in the manner I have pointed out.

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GARDINER v. SLATER.

THE testator, *William Wain*, by his will, bequeathed his personal estate to three trustees, upon trust, to pay over one moiety of the income to his daughter, *Mrs. Bennett*, for life, and after her decease, in trust "to pay, assign and transfer the capital or principal of such moiety of his said personal estate unto and between or amongst all the children of his said daughter, whether then born or thereafter to be born, in equal shares, when and as they should respectively attain the age of

twenty-

or guardians," with maintenance in the meantime. A child died under twenty-one, having married without any consent. Held, that her representatives took no share in the property.

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Bequest to trustees, in trust "to pay, assign and transfer" unto and between the children of *A. B.*, "when and as they should respectively attain the age of twenty-one years, or be married with the lawful consent of parents

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*twenty-one years, or be married with the lawful consent of parents or guardians, which event should first happen, and should pay and apply the interest and income of each child's portion, in the meantime, in and for his or her maintenance and education, at the discretion of them his said trustees and executors.*

“ And in case any of such children should depart this life before his, her or their share or shares should become payable as aforesaid, then his will was and he directed that the share of each child so dying and also any accruing portion or share, which he or she might have become entitled to by the death of any other of such children, should go and accrue to the survivors or survivor, others or other of such children, in equal shares, if more than one; and if only one child of his said daughter should live until the time so, as aforesaid, appointed for the said portions becoming payable, then he gave the said last-mentioned moiety of his personal estate wholly to such one child.”

The testator died in 1840, leaving his daughter *Mrs. Bennett* and *Mr. Bennett*, her husband, surviving. *Mr. Bennett* died in 1848, and in the following year his widow married again, and she died on the 4th of *July*, 1853.

*Mrs. Bennett* had four children only, of whom *Eliza Bennett* was born on the 3rd of *June*, 1834. On the 25th of *November*, 1850, in the lifetime of her mother, *Eliza Bennett* clandestinely married the Defendant *Henry Llewellyn*, without the consent of her mother. She survived her mother, and died on the 25th of *July*, 1853, a minor, without having had any living child.

... was instituted by the three other children o

*Mrs. Bennett*, against the executor of the testator and *Mr. Llewellyn*, and the question now was, whether the latter, in right of his deceased wife, took any interest in the fund.

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*Mr. R. Palmer* and *Mr. W. R. Ellis* for the Plaintiffs, argued, that *Mrs. Llewellyn* having neither attained twenty-one, nor married "with the lawful consent of parents or guardians," took no interest in the fund; the more especially as there was no gift, except in the direction to "pay, assign and transfer," *Leake v. Robinson* (a), to persons filling a specified character.

*Mr. Selwyn* and *Mr. Haddan*, *contrà*, for *Mr. Llewellyn*. *Eliza Bennett* had no guardian, and under the provision of the Marriage Act there was no person competent to give the consent required (b). Therefore, the condition had become impossible, and the legatee relieved from its performance.—[*The MASTER of the ROLLS* : You should have got a guardian appointed.]—Such conditions as these are not favored, and are construed strictly; *Burleton v. Humfrey* (c); *Aislabie v. Rice* (d); *Pollock v. Croft* (e); *Jarman on Wills* (f); and the consent, though not formally, was substantially given.

*Mr. Colt* for a surviving executor.

*The MASTER of the ROLLS.*

I cannot get over the express words of this will. This is not a condition of forfeiture, but a gift of property to certain persons on the happening of one of two events.

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(a) 2 *Mer.* 363.

(b) 4 *Geo.* 4, c. 76, s. 17.

(c) *Ambler*, 256.

(d) 3 *Madd.* 256.

(e) 1 *Mer.* 181.

(f) *Vol.* 2, p. 34.

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It is given to the daughter for life, and on her death to be paid to the children who attain twenty-one, or who marry with the consent of their parents or guardians. They must therefore either marry with consent, or attain twenty-one, before their interests become absolute.

It is true that this daughter survived her mother about three weeks, but she died before attaining twenty-one, and she did not marry with the "consent of her parents or guardians." The consequence is, that the event has not occurred on which the property vested absolutely in her.

Besides this, there is no direct gift to the children, other than a direction to "pay, assign and transfer the capital" on the death of the tenant for life. There is also an express gift over, and as I cannot say that she took a share, it went over to the surviving children, with respect to whom the event has happened. Without disputing the authority of the cases cited, I think they apply to a different state of circumstances.

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CAILLARD v. CAILLARD.

May 8.  
*Ex parte* motion, before appearance, for a Receiver refused.

MR. CRACKNALL moved for a Receiver *ex parte* and before appearance. He cited *Dowling v. Hudson* (a), and *Meaden v. Sealey* (b).

The MASTER of the ROLLS refused the motion, saying that the case of *Dowling v. Hudson* was as distinct as possible; for there the Defendant had absconded to avoid service.

(a) 14 *Beav.* 423.

(b) 6 *Hare*, 620.

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ASSURANCE COMPANY.

March 8, 9.

May 22.

**T**HE question was whether Mr. *Ayre* ought to be put on the list of contributories of this company, which was completely registered in *April*, 1852, and was ordered to be wound up in 1856.

In 1854, a Mr. *Bevan* was the manager and secretary of the company in *London*, and Mr. *Thomas* was its agent at *Bristol*. In *March*, 1854, *Thomas* applied to Mr. *Ayre*, a solicitor in *Bristol*, to take some new shares in the company, then about to be issued, and he wrote to *Bevan* that he had a friend who would take some new shares, if he could satisfy him that all the old shares had been fully paid up, that the directors and shareholders were men of respectability and responsibility, and that the company was in a flourishing condition.

In reply *Bevan* wrote to *Thomas* as follows :—

“ Dear *Thomas*,

“ Enclosed you have deed and list of principal shareholders, holding in the aggregate 10,650 shares. If

Where a person takes shares in a company through false representations, he will not be placed on the list of contributories if the misrepresentations be made by the company, but he will, if they be made by a third person.

A public company in such a case is not bound by the misrepresentation made by its manager or secretary without its sanction, who cannot be considered its agents to commit a fraud ; but the company will be answerable for that

misrepresentations made in a report of the directors, sanctioned by a general meeting.

In an action at law for calls by a company against a shareholder, he pleaded fraud, but the company obtained a verdict. The company having afterwards been ordered to be wound up, Held, that the verdict did not prevent the shareholder insisting that he was not a contributory, he having been induced to take the shares through the fraudulent misrepresentations of the company. Having proved his case here, the Court, notwithstanding the verdict, refused to place him on the list of contributories.

A person was induced to take shares in a company (insolvent at the time) by the false statements contained in the report of the directors, and the erroneous accounts submitted by them to the general meeting. Having discovered the company to be insolvent, he repudiated the shares. Held, that he was not a contributory.

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that won't satisfy your friend nothing will. Stick to him, as we want cash, and I will guarantee you a 50*l.* note, which you can deduct. Therefore no humbug; do it and get a fine Christmas box. The commission is only 20*l.*, but we can afford you 50*l.*

"Don't fail to telegraph if its done. Stick to him. Look for shareholders in neighbourhood of *Bristol*."

The enclosure was a document containing the names of shareholders holding 10,550 shares, and representing them to be persons of very large property. This was, in several particulars, wholly false.

The paper was shewn to *Ayre* by *Thomas*, who also stated, that the company was in a most flourishing condition, and that new shares were about to be issued for the purpose of extending its loan business.

On the 7th of *April*, 1854, *Bevan* and *Thomas* called on *Ayre*, and produced a report which had been issued by the directors of the company, dated the 25th of *March*, 1854, as to the state and prospects of the company. This represented the company as being in a highly flourishing condition.

So far from this being the case, it afterwards appeared, when the affairs of the company came to be examined, that according to the company's books it owed 10,561*l.*, while its assets amounted only to 10,362*l.* 6*s.* 3*d.*, thus shewing a deficit of 198*l.* 15*s.* 8*d.* The books, however, were far from shewing the real state of the account, for there were errors and omissions to such an extent, that if on the 31st of *March*, 1854, the company had been suddenly wound up, and the premises and furniture had realized the amount at which they were  
 valued

valued in the books, the company would have owed, and would have had to pay 7,817*l.* 1*s.* 1*d.* more than they had assets for that purpose.

The report represented the annual income of the company to exceed 10,000*l.*, but this was delusive, for the expenditure really exceeded the income. Again, by the same report, a dividend was declared of 5*l.* per cent., under the authority of the consulting actuary; and the directors recommended the shareholders to create an additional capital (under the 39th clause of their deed), by the issue of new shares, to extend "two important sources for increasing the company's business, viz., the loan department and the agency department."

A statement (which was also communicated to Mr. *Ayre*) was put forward at the meeting, and published by the directors, of the receipts and expenditure during the year 1853, from which, to an ordinary reader, it would appear, that there was an available balance of 13,208*l.* 12*s.* 8*d.* in the hands and at the disposal of the company, consisting of cash and investments. This statement did not purport to be a correct account of the actual position of the affairs of the company, but it contained serious errors, to the extent of 4,394*l.* 3*s.* 2*d.* in the balance there stated, and which reduced balance was merely imaginary, the company (as before stated) being in fact-insolvent.

The report was adopted by the general meeting on the 3rd of *April*, 1854, and was printed, together with the annual account of 1853, and the speeches made on that meeting, which contained the same flagrant misrepresentations. In addition, *Bevan* and *Thomas* made to *Ayre* other statements as to the company, which turned out to be wholly untrue, but it is unnecessary to state

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them,

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them, as they did not influence the Court in its judgment.

In consequence of these misrepresentations, *Ayre* agreed to take 200 new shares, and on the 7th of *April*, 1854, he signed the company's deed for that number; but having heard some rumours as to the actual position of the company, he repudiated all connection with it, and refused to pay the call upon the shares. In *July*, 1855, the company brought an action against him for calls, to which he pleaded, first, fraud, and secondly, that the shares agreed to be taken were new shares, which the company had no power to issue. The action was tried before Lord *Campbell* in *November*, 1855, and principally in consequence of the evidence of the directors as to the state of its affairs, the company obtained a verdict. Mr. *Ayre* not being then able, as he now said, to prove the fraud practised upon him, was compelled to pay the call, together with interest and costs.

The company was ordered to be wound up.

After the winding-up order it was sought to place Mr. *Ayre* on the list of contributories for the 200 shares. This he resisted on the ground of the fraud and misrepresentations. He alleged—1. That it was represented that the old shares had all been paid up, which was untrue. 2. That the directors were men of wealth, which was false. 3. That the receipts amounted to 10,000*l.* a year, which was not the fact. 4. That the concern was flourishing, whereas it was hopelessly insolvent. 5. That no new shares existed when he executed; the deed requiring, that the resolutions of the 3 of *April*, as to creating new shares, should be confirmed by a subsequent general meeting. 6. That the 1 shares had been issued for the purpose of paying debts, and not for extending the loan business.

The Chief Clerk decided in favor of Mr. *Ayre*, and the matter was now brought before the Court by the official manager, who insisted that *Ayre* was a contributory.

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Mr. *Selwyn* and Mr. *Nalder*, for the official manager, contested in first place, the fact, that the shares had been taken through any fraudulent misrepresentations. Secondly, they argued, that if any such had been made by the secretary, they were unauthorized by the company, and could not avail as against the official manager, who represented the whole body of shareholders composing the company; *Holt's Case* (a); *Re Hull and London Life &c. Company* (b); *The Royal British Bank (Brockwell's Case)* (c); *Re the Independent Assurance Company* (d); *Bernard's Case* (e); *Burnes v. Pennell* (f). Thirdly. That the verdict at law against Mr. *Ayre* was final, and concluded the rights between him and the company, and that if another action had been brought against him for a second call, the verdict in the first action, on the same issue, would have conclusively bound the Defendant. That there was no right to equitable relief, on the same grounds which had failed in the action; *Protheroe v. Forman* (g); *Larabrie v. Brown* (h).

Mr. *R. Palmer* and Mr. *Roxburgh* for Mr. *Ayre*. First. On the 7th of *April*, there was no power to issue new shares, for the resolution of the meeting of the 3rd of *April* required confirmation by a subsequent extraordinary meeting. Therefore there was no binding contract.

Secondly.

- (a) 22 *Beav.* 48.
- (b) 4 *Jurist*, N. S. 1005.
- (c) 3 *Jurist*, N. S. 879.
- (d) 1 *Simons*, N. S. 389.

- (e) 5 *De Gex & S.* 283.
- (f) 2 *House of L. Cas.* 497.
- (g) 2 *Swan.* 227.
- (h) 1 *De Gex & Jones*, 204.

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Secondly. *Ayre* was induced to take the shares by the fraudulent misrepresentations of the company and their officers at a time when it was insolvent. The contract, therefore, did not bind him; *Bell's Case* (a); *Brockwell's Case* (b); *Ginger's Case* (c); *National Exchequer of Glasgow v. Dick* (d).

Thirdly. The verdict is not conclusive; for *Ayre* had no means of bringing the true case before the Court of Law, and the frauds now complained of have been since discovered; *Hankey v. Vernon* (e); *Wilmot v. Lennard* (f).

*The MASTER of the ROLLS.*

I am not now about to express any opinion upon the merits of this case, and my present observations have reference solely to the way in which, I think, I am bound to look at it. In the first place, I do not consider that the trial at law binds the decision of this Court in this matter. It is quite true, as was observed, that questions of fact are generally better sifted, and the truth better ascertained, before a jury; but that depends upon the character and nature of the fact to be investigated. If it be one which depends on contradictory oral testimony, where the examination of the witnesses and their demeanour and cross-examination may assist the Court in coming to an accurate conclusion, on which of two contradictory statements is to be believed, then, undoubtedly, a jury is an infinitely better tribunal for the purpose of ascertaining what the real truth of the matter is; but if the question be, as here, one depending upon a careful examination of books, documents

(a) 22 *Beav.* 35.  
 (b) 26 *Law J. (Ch.)* 855.  
 (c) 5 *Ir. Ch. R.* 174.

(d) 2 *Macqueen*, 103.  
 (e) 2 *Cor.* 12.  
 (f) 3 *Swan.* 682.

documents and accounts, then, I think, that is a species of investigation which a jury is not so competent to deal with as a judge sitting alone. In fact where a case arises of that description, which involves a question of account, a jury is so little competent to go into it, that it is usually found essential to the ends of justice to refer the matter to some gentleman at the bar to ascertain the rights of the parties. I consider this to be such a case. In the first place, it is admitted, that the question with respect to the examination of the books and the details which have been gone into before me were not gone into before the jury, and could not have been properly investigated by them. I, who have paid the best attention I could to the arguments and statements of counsel, and have had, during the discussion, the opportunity of looking at the papers, do not now consider myself in a situation to express any opinion respecting the merits of the case, until I have had an opportunity of contrasting and comparing the statements made, with the documents themselves and the books containing those accounts. I, therefore, do not consider this to be a case in which it can be justly said, that a more perfect and complete tribunal has already been able to determine the question now before me.

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But that is not the only observation I have to make upon the trial at law. There is another still more important one, which is this:—That this is not even a rehearing of the question determined at law. The question of the propriety of the judgment by which Mr. *Ayre* was ordered to pay the amount of deposits upon the shares is not now before me, and I mean to express no opinion respecting it. There may be very great difficulty if Mr. *Ayre* were to attempt to set aside that verdict; but the question now is, whether, upon a consideration of the facts now before me, in winding up this company

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company under an order of this Court, I am to make him pay his proportion of the debts of the concern together with the other shareholders. He is here, in point of fact, in the character of a Defendant; he does not come here for the purpose of setting aside a judgment at law, but he is brought here to defend himself against a claim made by the other shareholders to compel him to contribute, as a shareholder, towards the debts due by this company. That is a totally different and new question, and it depends on a distinct set of facts now brought before me. If the statement made to me of the charge of the Lord Chief Justice to the jury be correct, it is obvious that the Lord Chief Justice believed, and relied much in the belief, that this was a perfectly thriving company, and that all that Mr. Ayre would have to do would be to pay his deposit and to receive his dividends. The case is very much altered when it appears that, six months after the trial, the company was totally unable to go on, and that it was necessary to wind it up here as a bankrupt concern; the question then arises, whether this gentleman is to be made to contribute in respect of these shares.

I mean to express no opinion now upon the merits of this case, but both parties accede to the view I took in *Bell's Case* and *Holt's Case*, viz., that where fraudulent representations are made by the company, a person taking shares on the faith of them is not thereby made a shareholder, but that where they are made by private individuals, whether they be directors or not, then he is a shareholder, and that, in the latter case, his only remedy is by an action against those private individuals.

I accede to the statement of the law, that an agent of the company is not its agent to commit a fraud, and that, therefore, any false statement made by an agent of the company, not sanctioned or authorized by the company,

company, would not bind it. It would be totally different if the company, by its board of directors, had expressly authorized the agent to say certain things, in that case, they would be statements made by the company itself. I shall, therefore, exclude from my consideration, in this case, any statements made by Mr. *Bevan* to Mr. *Thomas* and communicated by him to Mr. *Ayre*: but, at present, it appears to me to be established, that the balance-sheet and the report of the directors was laid before Mr. *Ayre* previously to his signing the deed and taking the shares; and if these were the foundation and the cause of his taking the shares, then I am of opinion, that as the prospectus, the balance sheet, and the report of the directors are strictly statements by the company, it is necessary for me to examine the books and documents of the company to see whether they are fair statements or not. I do not mean that trifling inaccuracies would affect the question; but if they be essentially and fundamentally false and calculated entirely to mislead a stranger, who had no access to the books, and to make him believe that the state of the company was wholly different from that which it really was, then I am of opinion that they are fraudulent misstatements made by the company, and that, in consequence, no person taking shares on the faith of them would be bound. These directors authorized certain persons to draw up the report and to make a balance-sheet; assuming that they are fundamentally wrong and misleading, I hold, that they must be treated as acts of the company, as statements emanating from them, and that persons induced by such means to take shares cannot be treated as contributories.

I will consider the affidavits and examine the accounts of the company before I give judgment.

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The question here is, whether Mr. *Ayre* ought to be put on the list of contributories, for the purpose of winding up the affairs of this company.

Mr. *Ayre*, on the 7th of *April*, 1854, executed the company's deed for 200 shares; he is, therefore, *primâ facie* a contributory of the company, and the burthen of proof lies on him to prove that his name ought to be removed from the list. His answer to this case is, that he was induced, by misrepresentation, to become a shareholder and to execute the deed. I have already pointed out the distinction on the subject, both in *Bell's Case (a)* and *Holt's Case (b)*, which is this:—If the misrepresentation be made by a private individual, it will not prevent the person who has unfortunately become the victim of it, from being a shareholder and contributing; his only remedy is by proceeding against the persons who deceived him; for as between himself and the other shareholders, he is a contributory. But if the misrepresentation be made by the company, then the company cannot have the benefit of making the person so deceived a contributory; the shareholders are, in this respect, bound by the acts of the company, and, consequently, as between themselves and the person deceived, no equity exists to have him put on the list of contributories.

*Ayre* has, therefore, to prove on the present occasion, first, that a representation was made to him, on the faith of which he became a shareholder; secondly, that such misrepresentation is untrue; and, thirdly, that such representation was made by the company.

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(a) 22 *Beav.* 35.(b) 22 *Beav.* 48.

The facts are these:—*Bevan* was the secretary and manager of the company down to the 28th of *July*, 1854, and during the whole time that the transactions which I have to consider occurred. *Bevan* wrote some letters in *March*, 1854, and particularly one of the 20th of *March* to *Thomas*, which were communicated to Mr. *Ayre*, and, as he says, influenced him in his becoming a shareholder. I pass over, without comment, the assertions made by *Bevan*, as to the state and expectations of the company; because, on the assumption that these statements were inaccurate, I am satisfied they cannot bind the company, and that no one, as secretary or manager, can be agent of the company to commit a fraud, unless he has been expressly directed by the board of directors to make a particular statement, in which case it would be a statement of the company.

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The misrepresentation in the present case, if it exist at all, is contained in the report of the directors, made to the special public meeting, and of which report a copy was sent and communicated to Mr. *Ayre*, and on the faith of which he swears, and in my opinion, proves, for I see no reason for doubting his assertion, that he applied for the shares and executed the deed. If this report contained misrepresentations of the state and condition and expectations of the company, then, in my opinion, they were misrepresentations by the company itself; and if the report contain important statements relative to the position and expectations of the company, which were untrue, which the directors at the time knew were untrue or ought to have known to be untrue from documents in their custody or power, then I am of opinion that *Ayre* ought not to be placed on the list of contributories.

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The occasion of this report being made was this :—  
 Under the 39th clause of the deed of settlement there was a power, under certain circumstances, to increase the capital of the company, by the creation and sale of new shares, and a general meeting of the company was accordingly convened for the 3rd day of *April*, 1854. The misrepresentations which Mr. *Ayre* alleges to have been made by the directors are the following : 1st. That the shares were fully paid up. 2nd. That premiums to the amount of 10,000*l.* per annum were received. 3rd. That the concern was in a flourishing state. 4th. That the new shares were issued in order to extend the loan business; whereas, in fact, they were issued to support the falling concern.

Mr. *Ayre* alleges these misrepresentations to have been made in the report made by the directors to the proprietors at the annual general meeting held on the 3rd of *April*, 1854, and in the accounts by which it was accompanied, and which documents had been previously communicated to *Ayre*, and were, as I have stated, the cause of his taking shares in the company. It becomes necessary, for the purpose of determining the question before me, to examine, 1st, what was the real situation and condition of the company; 2nd, how far the real condition appeared by the books of the company; and, 3rd, the accuracy of the representation contained in the report to the proprietors and the public.

As to the first two questions, the matter stands thus :—[*His Honor here went through the accounts, shewing a deficit in the books of 198*l.* 15*s.* 8*d.*, and an actual deficit of 7,817*l.* 1*s.* 1*d.**]

By the statement put forward at the meeting and published

published by the directors, of the receipts and expenditure during the year 1853, it would appear that there was an available balance in the hands of the company, consisting of cash and investments, amounting to 13,208*l.* 12*s.* 8*d.* Certainly, a more deceptive statement could scarcely be made, if this were to be taken to be a correct account of the actual position of the affairs of the company; however, this it certainly does not purport to do, although it would induce persons to form a very inaccurate opinion of the state of prosperity of the society.

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Admitting, however, this to be a mere statement of the receipts and expenditure of the company from the 1st of *January* to the 31st of *December*, 1853, and not a representation of the actual position of its affairs, still, the errors pointed out by the official manager constitute very serious errors in the account, and make a difference of 4,394*l.* 3*s.* 2*d.* in the balance there stated, and which balance, after all, was but a nominal one, for at that moment, their assets were not sufficient to pay their debts, as may be shewn by the accounts of the company, and as might be inferred from the fact, that three months later, namely on the 31st of *March*, 1854, the balance of liabilities over assets really exceeded 7,800*l.*

This statement of accounts was accompanied by the report to which I have referred generally, and which was much commented on by counsel on both sides.—  
[*His Honor stated it.*]

In my opinion, this report was calculated to produce a completely erroneous opinion of the real state of the concern. It is represented as being in a highly flourishing condition, as if the annual income of the company were

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1858. were upwards of 10,000*l.*, and this is coupled with the statement of receipts and expenditure, as if there were then upwards of 13,000*l.* an actual available balance at the disposal of the company; while, at that very moment, the company was insolvent, that is, the liabilities, actual and ascertained, exceeded its assets and that by a sum exceeding 7,000*l.*

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It is, in my opinion, immaterial, that according to the entries in the books of accounts kept by the company the deficiency of the assets to pay the liabilities appeared to be only 198*l.*, while the real deficiency was 7,800*l.* The directors were bound to know the real state of the company; it was their duty also to take care, that this real and actual position of the company might be ascertained by the books of the company; it would not, therefore, in my opinion, have availed the directors, if the books had shown a large balance of assets over liabilities, if the real fact were otherwise.

But that question does not arise here, for in this case, by the books as they stood, it appeared, that even after applying the furniture and selling the premises, they would not be able to discharge all the liabilities of the company; and, in this state of things, they publish this report, declare and pay a dividend of 5*l.* per cent., congratulate the shareholders on the success of their undertaking, and recommend an issue of new shares, not for the purpose of paying debts and of obtaining, in this delusive manner, funds to pay the dividends, but because, as they say, the loan and agency department which had turned out so highly profitable, had not been originally contemplated and had not been provided in the paid-up capital, and that in consequence of a further amount would be required for the full development of this branch of the company's business, w

was so profitable, that it was highly desirable to continue and extend it.

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I have no hesitation in saying, that this statement was incorrect and misleading, that it must have deluded every person who believed it into a wholly erroneous opinion of the state of the concern and its future prospects.

Whether the directors personally knew that these statements were delusive and untrue is, in my opinion, wholly immaterial, they were bound to know their falsity, they must be held to have known it, they were the vouchers to the public of the accuracy of their statements. They were the company itself, by its proper organs, announcing to the public the state of the concern; and the company can gain no benefit and can derive no advantage from the fact of having, by such delusive statements, induced strangers to become shareholders of the concern.

If this had been an ordinary partnership, and if, for instance, three partners had held this language to two strangers, and thereby had induced those strangers to enter into obligations and embark with them in the concern, then, whatever might have been the rights of creditors as against such strangers, so induced to join with the three original partners, still, as between those partners and the deluded strangers, the latter would be relieved by this Court from all the obligations into which they had thus been induced to enter.

The case is the same here, the statement made by the directors, in their official character, to a public meeting are the statements of the company. The company and all the shareholders constituting that company, at the time when the statements are made,

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are bound by those statements, as between themselves and strangers; and no stranger thus induced to take shares can be held to be bound to contribute towards the payment of the liabilities contracted by the company, who, by false statements or by fraudulent concealment, have induced those persons to join them. The first province of a Court of Equity, as I have often remarked, is to enforce truth in the dealings of all men, a literal adherence to which is the foundation of the whole doctrine of equity. If a man make a promise for the purpose of inducing, and thereby induces another to do a particular act and incur liabilities, equity will compel him to keep that promise. If a man enter into an obligation, equity is not satisfied by his compensating the person to whom he became bound, by means of a pecuniary payment, but it compels him to perform the actual obligation he undertook. It is equally the province of equity to prevent any man or body of men from gaining any advantage by the assertion of that which is false, or by the suppression of that which is true. This, no doubt, puts directors of a company frequently in a position of considerable difficulty, as the company may be one which they may really believe, and probably correctly, will eventually thrive, if the truth be concealed; but which may be wholly destroyed by a complete disclosure of its affairs. Still I express my unhesitating opinion, that unless directors do make such full disclosures, they may not merely incur serious consequences to themselves personally, but that neither they nor their shareholders can derive any advantage, in a Court of Equity, from having, by such means, deluded strangers to join them.

In this case, I am of opinion, that Mr. *Ayre* was so deluded, and that he ought not to be on the list of contributories.

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The case before me is not, in my opinion, affected by this circumstance, that in 1855, the company brought an action against Mr. *Ayre* for the payment of his deposits on the 200 shares taken by him. This action was defended by him, and it came on to be tried before Lord Chief Justice *Campbell* in *November*, 1855, when a verdict was given against Mr. *Ayre* and in favor of the company.

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I am of opinion that I am not bound by this verdict, the more so, as when the notes of the summing-up of the Chief Justice to the jury were read to me, I found, that his Lordship laid down the law exactly on the same principles as those on which I proceed. In fact, in that case, there was no evidence of misrepresentation, the books were not laid before the jury, nor were the results of the accounts stated to them. It is clear that *Ayre* is entitled to the benefit of that evidence on the present occasion, and that I am bound to act on the case as proved before me, the result of which I have stated, as it appears from the papers and accounts of the company and the evidence before the Chief Clerk. I also find, that on the 11th of *July*, 1856, following this action, the company came to a resolution (one which I think they could not have avoided) to wind up the company. If these facts had been before the jury in *November*, 1855, if they had known that the company was insolvent in *April*, 1854, when the shares were taken, if they had known that the company had been getting only deeper into liabilities since that time, and that the then state of it was such, that it would be necessary to wind it up in the course of nine or ten months, I think that the Chief Justice would have made a very different charge to the jury, and that the jury would probably have given a very different verdict. However, that matter is over, and is not now capable of being re-

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 AYRE'S CASE.  
 In re  
 THE DEPOSIT  
 AND GENERAL  
 LIFE  
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opened. Mr. *Ayre* might have brought before the jury the facts now before me as to the state of the company in *April*, 1854, and he must abide the consequences of not having done so. Accordingly, he has had to pay the deposit on the shares he took, and also the costs of the action, and I assume that he will not be able to get them returned: but the fact that Mr. *Ayre* was compelled to make this payment takes away any question of acquiescence, on which the official manager might have relied if the payment had been voluntary.

My opinion being in favor of Mr. *Ayre* on this point, I think it unnecessary to discuss, in detail, the other question raised by his counsel, viz., whether Mr. *Ayre* repudiated these shares before they were allotted to him and before they had any legal existence, further than to say, that if the case had rested on this, Mr. *Ayre* would have had, in my opinion, but a slender ground of defence, for after he had been allowed to execute the deed, it would have been difficult for the company, if the shares had been profitable, to have excluded him from a share of dividends, and the rights and obligations, so far as this question is concerned, must be reciprocal.

On the former ground, my opinion is, that Mr. *Ayre's* name ought to be omitted from the list of contributories.

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NOTE.—See also *Nicol's Case*, 5 Jur. (N. S.) 205.

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## MADDOCK v. LEGG.

April 22.  
June 25.

THE testator gave the dividends of his funded property to his son *William*, and his daughters *Susannah* and *Ann*, equally for their lives, and after their deaths to the wife and husbands of them (by name) equally for their lives. After the decease of these six persons, the testator "gave, devised and bequeathed unto *their and each of their issue* lawfully begotten, or the survivor of them, on their severally attaining their respective ages of twenty-one years, all his said funded property, with such dividends and interest that might be then due and payable thereon, in equal proportions, share and share alike, to and between them, their executors, administrators and assigns, for their and each of their own separate use and disposal for ever." But in case of the death of any of the above issue, before attaining twenty-one, his part should be divided among the survivors of such issue.

Gift to "issue" after the death of a tenant for life, held to include issue of every degree.

Bequest to persons for life, and after their deaths, "unto their and each of their issue, and the survivor or the survivors of them, on their severally attaining twenty-one, in equal proportions. On the death of the last tenant for life, there were three generations of issue living. Held, that all who survived and attained twenty-one participated in the fund.

The testator died in 1810, and the last tenant for life on the 10th of *July*, 1856. The fund thereupon became divisible amongst the issue. The issue of the tenants for life who were living on the 10th of *July*, 1856, consisted of their children, grandchildren and great-grandchildren, twelve in number, some of whom were infants. Besides these, there had been other issue who had attained twenty-one, but had died in the lives of the tenants for life.

This was a petition by five of the grandchildren of the testator for payment of the fund. They insisted, that, according to the true construction of the will of



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the testator, and in the events that had happened, the seven grandchildren of the testator, who were living at his death and attained twenty-one years of age, or the representatives of such of them as were dead, were absolutely entitled to the fund.

The more remote issue of the testator's three children, who had attained twenty-one years, claimed to be entitled to the stock, jointly with the grandchildren of the testator; and those who were now infants claimed to have a portion set apart to answer their shares, in case they should attain twenty-one years.

Mr. *Collins*, in support of the petition, contended that the word "issue" in this will was synonymous with "children," and that the children who attained twenty-one alone took the fund.

Mr. *Swanston*, jun. and Mr. *Martindale*, for the Respondents, contended that all the issue who survived the tenants for life and attained twenty-one took. They referred to *Hughes v. Sayer* (a); *Lees v. Mosley* (b); *Slater v. Dangerfield* (c).

The MASTER of the ROLLS declared, that the immediate and more remote issue of the testator's three children, *William*, *Susannah* and *Ann*, who were living on the 10th of *July*, 1856, and who had or should attain twenty-one, were and would be entitled absolutely to the fund. He directed the fund to be divided into twelve parts, and the shares of the adults to be paid, but those of the infants to be carried over to their contingent accounts (d).

(c) 15 *Mee. & W.* 263.  
(d) *Reg. Lib.* 1857, B. fol.

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## NASH v. BRYANT.

May 3, 22.

**B**Y the 6 Ann. c. 16, s. 4, it is provided, that "all persons that shall act as brokers within the city of *London* and liberties thereof, shall, from time to time, be admitted so to do by the Court of Mayor and Aldermen of the said city, for the time being, under such restrictions and limitations for their honest and good behaviour as that Court shall think fit and reasonable, and shall, upon such their admission, pay to the chamberlain of the said city, for the time being, for the uses hereinafter mentioned, the sum of 40*s.*, and shall also, yearly, pay to the said uses the sum of 40*s.* upon the nine-and-twentieth day of *September* in every year."

A bond was given by a broker to the Corporation of *London*, to secure the due performance of his duties. He made default. Held, on his death, that the corporation held the amount recovered on the bond as equitable assets, and in trust for the general body of his creditors, and not exclusively for those who had suffered by his defaults.

The 5th section imposes a penalty of 25*l.* (increased to 100*l.* by the 57 Geo. 3, c. lx. s. 2), payable to the Mayor or commonalty and citizens on any person acting as a broker within the city, he not being admitted.

*Edward Newton Bryant* was admitted a sworn broker within the city of *London*, and by bond, dated the 20th of *May*, 1837, he became bound to the Mayor and commonalty and citizens of *London* in the sum of 1,000*l.*, conditioned as follows:—

"Now the condition of the obligation is such, that if the said *Edward Newton Bryant*, for and during such time as he shall and doth continue in the said office and employment, shall and do well and faithfully execute and perform the same, without fraud, covin or deceit; and shall, upon every contract, bargain or agreement by him made, declare and make known, to each person or persons with whom such agreement is made, the name or names of

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his principal or principals, either buyer or seller; and shall keep a book or register, intituled the 'Broker's Book,' and therein truly and fairly enter all such contracts, bargains and agreements, on the day of the making thereof, together with the christian and surname, at full length, of both the buyer and seller, and the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request, respectively, containing therein a true copy of such entry; and shall, upon demand made by any or either of the parties, buyer or seller, concerned therein, produce and shew such entry to them, or either of them, to manifest and prove the truth and certainty of such contracts and agreements; and, for satisfaction of all such persons as shall doubt whether he is a lawful and sworn broker or not, shall, upon request, produce a medal of silver, with his Majesty's arms engraven or stamped on one side, and the arms of this city, with his name, on the other; and shall not, directly or indirectly, by himself or any other, deal for himself or any other broker in the exchange or remittance of money, or in buying any tally or tallies, order or orders, bill or bills, share or shares, or interest in any joint stock, to be transferred or assigned to himself or any broker, or to any other in trust for him or them, or in buying any goods, wares or merchandizes, to barter or sell again upon his own account, or for his own or any other broker's benefit or advantage, or make any gain or profit in buying or selling any goods, over and above the usual brokerage; and shall and do discover and make known to the said Court of Lord Mayor and Aldermen, in writing, the names and places of abode of all and every person and persons as he shall know to use and exercise the said office or employment,

not

not being thereunto duly authorized and empowered, as aforesaid, within thirty days after his knowledge thereof; and shall not employ, or cause, permit or suffer any person or persons to be employed, with, under or for him, to act as a broker within the said city and liberties thereof, not being duly admitted as aforesaid: then this obligation to be void."

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Edward N. Bryant died in 1856, greatly indebted, and it was admitted that the conditions of the bond given to the Corporation of *London* had been broken in his lifetime, he having fraudulently converted bonds and securities to his own use, and having neglected to invest moneys intrusted to him as broker.

This was a creditors' suit, and on the usual reference, the assets appeared to amount to about 3,500*l.*, and simple contract debts to 22,000*l.* There was no specialty debt except the bond to the corporation. The corporation, at first, made no claim, but, instigated by a creditor, they carried in a claim for the full amount of the bond, which was allowed.

There was a contest between the defrauded creditors and the general body of creditors, whether the amount recovered on the bond was to be divided exclusively between the former, or to be treated as equitable assets, and divided amongst all the creditors.

Mr. *Lloyd* and Mr. *Sheffield*, for the Plaintiffs, argued, that the corporation held the amount recovered as trustees, and that it constituted equitable assets; but that if the defrauded creditors alone were held to be entitled to the money recovered on the bond, then they could not receive anything out of the other assets until the other creditors had been paid proportionately; *Wilson v. Paul* (a); *Mitchelson v. Piper* (b).

Mr.

(a) 8 *Simons*, 63.(b) *Ibid.* 64.

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Mr. *Baggalay* for the Corporation of *London*.

The order ought to be simply for payment to the obligees of the bond, and no declaration of rights ought to be made. It is the custom of the city to divide the produce amongst those persons who have suffered by the defaults of a broker acting in that character, and such is the intention, in the present case. *Ex parte Dysten* (a) was cited; and see *Green v. Weaver* (b).

Mr. *Follett* and Mr. *Lewis* for other parties.

The MASTER of the ROLLS.

My impression is, that the Corporation of *London* must hold the amount recovered on the bond for the benefit of all the creditors, and not for the particular class defrauded. I will look into the question, which is one of some nicety (c).

The MASTER of the ROLLS.

May 22. The corporation, very properly, when the matter came to be discussed before the Chief Clerk, admitted that they had no personal interest, but submitted, that the fund recovered on the bond ought to be divided between those parties only, who had suffered from losses arising out of transactions with the testator in his character of broker.

I am of opinion that the city hold the money recoverable on the bond merely as trustee for certain purposes which have failed, viz., to secure the due performance, by Mr. *Bryant*, of his duty of broker, and to enable them

(a) 1 *Mer.* 155.

(b) 1 *Simons*, 404.

(c) *Lamb v. Vice*, 6 *Mcc. & W.* 467.

them to enforce it. I think, therefore, this fund must be treated as payable amongst all the general creditors *pari passu*. I must declare, that the amount due on the bond constitutes equitable assets, and that it is divisible equally among all the creditors.

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BLANDY v. KIMBER. (No. 2.)

THIS case is reported *ante* (a).

In 1802, *Kimber* and wife mortgaged some property for 100*l.*, and in *January*, 1803, they further charged it with 150*l.*, thus making a valid charge of 250*l.*

They executed a further charge for 50*l.* on the 3rd of *November*, 1803.

Mr. *Kimber* died in 1829, at which time there was an arrear of interest amounting to 60*l.*, which the Plaintiff alleged had been capitalized. On the death of her husband, Mrs. *Kimber* became entitled to the property, and she continued to pay 18*l.* a year as interest on the aggregate sum of 360*l.* down to *June*, 1852. This amounted in the twenty-three years to 360*l.* She died in 1854.

At the hearing, it was decided, that the last advance of 50*l.* was not well charged on the property, and that the 60*l.* had not been capitalized. By the decree, it was referred to chambers to take an account of what was due to the Plaintiff for principal and interest.

June 1, 3.
Interest was paid on a mortgage of 360*l.* from 1829 to 1852, but the Court, in 1857, decided, that 110*l.* of the 360*l.* was not well charged on the property. Held, in taking the accounts, that the interest, thus paid for twenty-three years on the 110*l.*, ought not to be treated as payments in discharge of the capital of the remaining 250*l.*

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The Chief Clerk took the account as follows :—

	£	s.	d.
Principal money due on 2nd of <i>March</i> , 1829	250	0	0
Interest to same date	60	0	0
	310	0	0
Subsequent interest on 250 <i>l.</i> at 5 <i>l.</i> per cent., from 2nd of <i>March</i> , 1829, to 19th of <i>March</i> , 1858 (date of certificate) .	355	15	0
	665	15	0
Deduct payments of 18 <i>l.</i> per annum, from 24th of <i>June</i> , 1829, to 24th of <i>June</i> , 1852	414	0	0
	<u>£251</u>	<u>15</u>	<u>0</u>

The Plaintiff took out a summons to vary the certificate, submitting that it was erroneous, because it "treated the sums paid during the life of *Sarah Kimber* as being paid in respect of the 250*l.* capital, the 60*l.* arrears of interest, and the subsequent interest on the 250*l.*, whereas the same were not, in fact, so paid, but were, in fact, paid and received on account of interest on 360*l.* (the aggregate amount of the three several sums of 250*l.*, 60*l.* and 50*l.*); and although the Plaintiff has not made out that more than 250*l.* is to be charged as capital, yet inasmuch as, during the life of *Sarah Kimber*, there was paid, through her agent, interest on the whole 360*l.*, and the sums paid were received for such interest, and not on account of capital, or otherwise than for interest on 360*l.*, the Defendants cannot require 5*l.* 10*s.* a year (being the amount paid over and above interest on 250*l.*) to be applied in reduction of the capital sum of 250*l.* and the 60*l.* arrears of interest,

interest, such application being contrary to the intention both of payer and receiver, and the Plaintiff's contention being not only consistent with but supported by the judgment of the Master of the Rolls on the hearing of the case. The 414*l.* for deductions being made up of the annual sum of 18*l.* per year for interest on the 360*l.*, from the year 1830 to the year 1852, both inclusive, the Plaintiff submitted, that the sum of 242*l.* 10*s.* was the proper sum to be paid for deduction, being interest on the sum of 250*l.* at the rate of 12*l.* 10*s.* per year for the like period, and, consequently, that the sum of 423*l.* 5*s.* ought to be certified to be due to him."

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Mr. *R. Palmer* and Mr. *C. Hall* for the Plaintiff.

Mr. *Lloyd* and Mr. *Langworthy* *contra*, argued, that the excess of payment had been made under a mistake, and could not be attributed to the interest on a mortgage which had been virtually set aside. That the money had been received and must be given credit for in taking the accounts, and that there could be no apportionment, because there were not two debts. They cited *Livesey v. Livesey* (a). Secondly, that only six years of interest could be recovered.

Mr. *C. Hall*, in reply.

The MASTER of the ROLLS.

The state of the case is this :—Both parties believed that 360*l.* was due on the mortgage ; and from 1829 to 1852, interest was regularly paid on it by Mrs. *Kimber*.

I held,

(a) 3 *Rus.* 287.

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I held, at the hearing, that 250*l.* only was due for principal, and that 110*l.* must be struck off. It seems scarcely possible to say, that interest was not paid on the 250*l.* down to the 23rd of *June*, 1852, because it was paid in aggregate sums of which it formed a portion. As to the other portion of the 18*l.*, I think it would be extremely unjust to hold, that that which was paid for interest on the 110*l.*, is to be now treated as paid in discharge of the capital of 250*l.*

BULL v. COMBERBACH.

June 4.

Devise of freeholds to six persons, equally, for life, and after the death of the survivor to sell, "and the money to be equally divided amongst their several heirs." Held, that their children, and not their heirs at law, were intended.

THE testator devised nine freehold houses in the *Sand Pits*, and a house in *Newcastle Street, Stafford*, to two trustees and their heirs, upon trust, as to the yearly rents, for six persons, namely, his sister *Mary Edwards*, his nieces *Sarah Bull* and *Mary Rutter*, and his nephews *Thomas Jobber*, *Samuel Jobber* and *John Jobber*, the same to be equally divided to each and every of them for and during their natural lives; and if any one of them "should die, then his or her share to be divided amongst the survivors, and so on with all the remainder; and after the decease of all the above-named *Mary Edwards*, *Sarah Bull*, *Mary Rutter*, *Thomas Jobber*, *Samuel Jobber* and *John Jobber*, the said nine houses in the *Sand Pits*, and the house in *Newcastle Street*, to be sold, and the money equally divided amongst their several heirs."

He gave other freehold messuages in *Chapel Street* to the trustees in fee, upon trust for certain tenants for life

life, and on their decease to the same six persons for their lives, and after the decease of the survivor of them, to be sold, and the moneys (after deducting the expenses of the sale) to be equally divided between the several heirs of the above-named *Mary Edwards, Sarah Bull, Mary Rutter, Thomas Jobber, Samuel Jobber* and *John Jobber*, and to have equal share and share alike.

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The will empowered the trustees to give effectual releases and discharges for moneys received by them.

The six tenants for life (except *Samuel Jobber*, who died without issue) left children. The survivor of them died in 1867, and the trustees sold the messuages in the *Sand Pits* and *Newcastle Street* for 762*l*.

This bill was filed by the eldest son and heir of *Sarah Bull*. It stated that the trustee *Comberbach* alleged, that there was some question whether, upon the true construction of the will, the purchase-moneys for the said messuages were divisible among the Plaintiff and the heirs at law of *Mary Edwards, Mary Rutter, Thomas Jobber, Samuel Jobber* and *John Jobber*, or between all the children of *Mary Edwards, Sarah Bull, Mary Rutter, Thomas Jobber* and *John Jobber*.

The bill prayed that the trusts of the will, so far as they related to the messuages sold, might be performed and carried into execution under the direction of this Court, and that the rights and interests of the parties beneficially interested in the purchase-money might be declared.

Mr. *Greene* and Mr. *Southgate* for the Plaintiff. The word "*heirs*" is to be understood in its legal and ordinary

1858. ordinary sense; *Mounsey v. Blamire* (a); *Doe d. Knight v. Chaffey* (b); *De Beauvoir v. De Beauvoir* (c); *Boydell v. Golightly* (d). The cases of substitution, as *Jacobs v. Jacobs* (e); *Doody v. Higgins* (f); *Gittings v. M'Dermott* (g), are inapplicable to this case; *Jarman on Wills* (h); *Shepherd's Touchstone* (i).

Mr. *Hardy* for another heir.

Mr. *J. J. Jervis* for the trustee.

Mr. *Teed* and Mr. *Colt* for *Henry Bull*, a younger son of *Sarah Bull*. The word "*heirs*," in reference to the produce of the sale of real estate, which is to be considered as absolutely converted into personalty, must be construed *children*; *Loveday v. Hopkins* (k); *Symers v. Jobson* (l). The fund, when realized, is to be equally divided amongst the "several heirs" of six persons. The class of several heirs contemplated by the testator must therefore be a plurality and not a single individual like the heir at law; *Vaux v. Henderson* (m); *Gompertz v. Gompertz* (n); *Jacobs v. Jacobs* (o); *Low v. Smith* (p); *Holloway v. Holloway* (q), and see *Roper on Legacies* (r).

Mr. *Greene*, in reply, cited *Southgate v. Clinch* (s).

The MASTER of the ROLLS.

It is clear that this will is not governed by any of the authorities cited, and I must judge of it from the words
used

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| (a) 4 <i>Russ.</i> 384. | (i) <i>Page</i> 446 (7th edit.) |
| (b) 16 <i>Mee. & W.</i> 656. | (k) <i>Ambler</i> , 273. |
| (c) 15 <i>Sim.</i> 163; 3 <i>House of</i> | (l) 16 <i>Sim.</i> 267. |
| <i>L. Cas.</i> 524. | (m) 1 <i>Jac. & W.</i> 388. |
| (d) 14 <i>Sim.</i> 327. | (n) 2 <i>Phil.</i> 107. |
| (e) 16 <i>Beav.</i> 557. | (o) 16 <i>Beav.</i> 557. |
| (f) 9 <i>Hare</i> , xxxii.; 2 <i>Kay &</i> | (p) 25 <i>L. J. (Ch.)</i> 503. |
| <i>J.</i> 729. | (q) 5 <i>Ves.</i> 399 |
| (g) 2 <i>Myl. & K.</i> 69. | (r) <i>Page</i> 89 (4th edit.) |
| (h) <i>Vol.</i> 2, p. 65 (2nd edit.) | (s) 4 <i>Jurist</i> (N. S.), 428. |

used by the testator; it is not a case of substitution. I think that by the word "heirs" used, the testator meant *children*, and that the produce of the sale is to be divided amongst them. There is a gift to six persons and the survivor for life, and then to sell, and power is given to the trustees to give discharges for the purchase-money, which is to be "equally divided amongst" the several heirs of the six tenants for life.

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I am at a loss to conceive why he should direct the property to be sold, except for the purpose of division amongst a larger class than the tenants for life; he does not think that six persons are too many to hold and enjoy it in common, but he does think it necessary to direct, that after their deaths it shall be sold for the purpose of division. I think the testator intended children, and this is consistent with decisions. Where personality is given to one for life, and after his death amongst his heirs, I should have no doubt that the expression "heirs" would apply to children.

Here I think that the meaning of the testator was, that the children should take, and there must be a declaration to that effect, and an inquiry what children there were.

1858.



MANSERGH v. CAMPBELL.

June 10.

Bequest of an annuity or rent-charge to A. for life, and after her decease, unto her children equally, to be applied in their maintenance until the youngest attained twenty-one, and then to be sold and the produce divided amongst them. Real estates were then devised to B. charged with the annuity. Held, that the rent-charge was perpetual and not for life.

THE testator, by his will, expressed himself as follows:—

“I give and bequeath to my niece *Anne Baker*, now living with me, one annuity or clear yearly rent-charge or sum of 300*l.* of lawful money current in *Great Britain*, to be paid to her by four equal quarterly payments” in the year, &c., “for and during the term of her natural life, free and clear of all deductions,” &c. &c., “for her own sole and separate use and benefit, during her life, and from and after the decease of her, my said niece *Anne Baker*, I give and bequeath the said annuity, yearly rent-charge or sum of 300*l.* unto all and every the children (if any) of my said niece lawfully to be begotten, (if more than one,) share and share alike, and if but one, then to such only child, to be paid and applied for and towards the support, maintenance and education of such child or children, by equal quarterly payments, on the days and times and in manner aforesaid, until such only child or the youngest of such children shall attain the age of twenty-one years; and when and as soon as such only child or the youngest of such children shall have fully attained the age of twenty-one years, then I direct that the said annuity or yearly sum of 300*l.* shall be absolutely sold and disposed of by such child or children of her, my said niece *Anne Baker*, and that the money to arise and be produced by and from such sale shall go to and be equally divided among such children (if more than one), share and share alike.”

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And after giving to *T. E. H.* another annuity of 20*l.* a year for his life, the testator proceeded as follows:—
 “ And I do hereby charge and make chargeable all and singular my freehold estates, situate in the *Isle of Wight*, and the counties of *Southampton* and *Wilts*, and elsewhere in *England*, with the payment of the said several annuities or yearly rent-charges of 300*l.* and 20*l.* Accordingly, subject to and charged and chargeable with the payment of the said several annuities as aforesaid, I give and demise unto my good friend *James Harvey*, of *Whitecroft*, in the *Isle of Wight* aforesaid, yeoman, all and singular my freehold estates called *Marvell* and *Blackwater*, and all my proxies, tithes and hereditaments situate in the *Isle of Wight* aforesaid, and also all and singular my freehold estates situate in the said counties of *Southampton* and *Wilts*, and all other my freehold messuages, lands, tenements, tithes, hereditaments and real estates, whatsoever and wheresoever, and to which I may be entitled either in possession, reversion, remainder or expectancy, with their and every of their rights, members and appurtenances, to hold the same and every part and parcel thereof, with their and every of their rights, members and appurtenances (subject as aforesaid), unto and to the use of the said *James Harvey*, his heirs and assigns for ever.”

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The testator gave all his residuary personal estate to *James Harvey*, and appointed him executor of his will.

The testator died in 1802.

Anne Baker who had four children, died in 1856.

The bill was filed by one of her children against the devisees

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devisees of *Harvey* and others, praying a declaration that the annuity or rent-charge of 300*l.* given by the will was a perpetual annuity; that it might be ascertained out of what lands it was issuing, and for consequential directions.

Mr. *R. Palmer* and Mr. *J. H. Palmer* for the Plaintiffs, contended that the will gave a perpetual rent-charge. They cited *Heron v. Stokes* (a); *Stokes v. Heron* (b); *Blewitt v. Roberts* (c); *Yates v. Maddan* (d); *Pawson v. Pawson* (e); *Kerr v. The Middlesex Hospital* (f); *Robinson v. Hunt* (g).

Mr. *Follett* and Mr. *Selwyn* in the same interest, cited *Potter v. Baker* (h).

Sir *R. Bethell* and Mr. *Giffard*, for the owners of the estate, argued, that a life annuity only was bequeathed by the will. They cited *Innes v. Mitchell* (i); *Holder-ness v. Carmarthen* (k); *Coke, Lit.* (l); *Statute de Donis*; *Ex parte Wynch* (m); *Attorney-General v. Bright* (n); *Knight v. Ellis* (o); *Wilson v. Maddison* (p).

The MASTER of the ROLLS.

In this case I am in favor of the Plaintiff. The question lies within the smallest possible compass, and is one, as to which the principles laid down in the reported cases in no degree differ. The only question,
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| (a) 2 <i>Dru. & W.</i> 89. | (i) 6 <i>Ves.</i> 460; 9 <i>Ves.</i> 212. |
| (b) 12 <i>Cl. & Fin.</i> 191. | (k) 1 <i>Bro. C. C.</i> 377. |
| (c) 10 <i>Simons</i> , 491; <i>Craig & Phillips</i> , 274. | (l) <i>Page</i> 144 <i>b.</i> |
| (d) 16 <i>Simons</i> , 613. | (m) 1 <i>Smale & G.</i> 427; 5 <i>De Ger, M. & G.</i> 188. |
| (e) 19 <i>Beav.</i> 146. | (n) 2 <i>Keen</i> , 57. |
| (f) 2 <i>De Ger, M. & G.</i> 576. | (o) 2 <i>Bro. C. C.</i> 569. |
| (g) 4 <i>Beav.</i> 450. | (p) 2 <i>Y. & C. (C. C.)</i> 372. |
| (h) 13 <i>Beav.</i> 278; 15 <i>Beav.</i> 489. | |

in all the cases of this description is, what meaning is to be affixed to the words used by the testator. The principle is not only very clear, but it has not been contested in the argument of this case. An annuity or rent-charge may, undoubtedly, be granted or created for any length of time; it may be perpetual, or for life or lives, or for years. The only question, in all these cases, is, what is the duration which the testator has attached to the annuity?

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v.
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It is also equally clear, not only that in ordinary parlance but on the authority of the reported cases, decided in accordance with common sense, that if an annuity be simply given to *A.*, it means merely an annuity to him for his life; and if it be given to *A.* expressly for life, and afterwards to *B.*, simply, the latter also takes it for his life only. But the question in this case is this:—whether the testator has not created an unlimited annuity *simpliciter*, and then disposed of it in a particular way? I think it very immaterial in this case, whether the creation of the annuity precedes or follows the interests carved out of it. I will, therefore, first consider what is the annuity or rent-charge which the testator creates, and then the interests which he gives out of it. Taking the last sentence first, the testator says:—"I do hereby charge my freehold estate with a rent-charge of 300*l.* a year, and subject and charged with the payment of it, I give my freehold estates to *James Harvey*, to hold (subject as aforesaid) to him and his heirs for ever." What limit in point of duration is there to that annuity or rent-charge? So if he had said, "I give the whole of my real estate to *James Harvey* in fee, charged with an annuity or rent-charge of 300*l.*," what difference would there be? It is clear that the authorities which have been referred to do not at all touch that case. If

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any inference whatever could be drawn from these words, it would be rather in favor of a perpetual annuity, inasmuch as the testator has, so far, given an annuity without reference to the name of any person whatever, as was done in *Blewett v. Roberts*, and the other cases, and without any limit as to its duration.

Such being the unlimited nature of the annuity or rent-charge, I next proceed to consider how he has dealt with it. He says:—"I give to my neice this annuity or rent-charge of 300*l.* for her life; and after her death, I desire it to go for the benefit of all her children, for their maintenance and education, until the youngest attains twenty-one, and when the youngest attains twenty-one, I desire"—what? "that the annuity or rent-charge," (which still remains in the same indefinite state as to duration, and is still unconnected with the name of any person whatever, and is issuing out of and charged on an estate devised by him in perpetuity to a devisee in fee simple,) "shall be absolutely sold, and the produce divided amongst the children." I am unable to conceive any reason why such an annuity or rent-charge is to be cut down to the lives of the children. If an annuity had been simply given to the children, it would have been quite a different thing. The only annuity given to the children was to last until the youngest child should attain twenty-one, and was for their maintenance and education. It would seem to be an idle direction and mere surplusage to direct an annuity given to persons for life to be sold. What advantage could arise from such a direction? The annuitants might sell it themselves, without any direction in the will for that purpose. Here there is simply a direction that this particular annuity, so indefinitely created and charged

charged upon all the testator's freehold property, shall be sold, and the produce divided amongst the children. If the order of the sentences had been inverted, and the testator had first created the rent-charge, and afterwards apportioned it in this manner, I should have entertained no doubt whatever that he had given an unlimited and perpetual rent-charge.

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v
CAMPBELL.

But does it make any difference that, in fact, he begins it in this way :—" I give an annuity or rent-charge to my niece for her life ; after her death, I give this same annuity or rent-charge for the maintenance and education of her children until the youngest shall attain twenty-one, and when the youngest attains twenty-one, I desire this annuity or rent-charge to be sold, and the produce divided amongst them?" What is the annuity or rent-charge which is to be sold ? Not that given to his niece for her life, for that has expired upon her death ; not that which was to be applied to the maintenance of the children until the youngest attains twenty-one, for that ceases upon that event happening.

Sir *R. Bethell*.—The maintenance clause is in a parenthesis.

The MASTER of the ROLLS.

I read the will thus :—No child is to take an annuity beyond the time when the youngest attains twenty-one, and then there is a direction, that this said annuity or yearly sum of 300*l.* shall be absolutely sold, and the produce divided among them. If the testator had intended them only to take life interest, he would simply have given them this annuity, and then have

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directed, that during their minorities, their shares of it should be applied in their maintenance and education. But here there is an express gift of an annuity until the youngest child shall attain twenty-one, and then a direction that it shall be sold. What annuity is to be sold? There is none except that which, in a subsequent part of his will, he has charged on his freehold estates, and, subject to which, he has devised them.

Then what is the limit to the annuity? In my opinion, there is none; the testator intended to give a rent-charge in fee simple, issuing out of fee simple estates, and which he limited to the niece for life, and afterwards to her children, for their maintenance and education, until the youngest child should attain twenty-one, and then the rent-charge was to be absolutely sold and the produce divided amongst them.

I will make a declaration to that effect.

NOTE.—Affirmed by Lord *Chelmsford*, L.C., Nov. 18, 1858.

1858.

BEAVER v. NOWELL.

THE testator, by his will, dated in 1832, proceeded as follows :—

“And whereas I am entitled to certain other freehold, leasehold or other estates, and to moneys invested in the funds, or personal or other securities, and to book debts: now it is my will, that all the residue of the annual profits and produce of such freehold, leasehold or other estates, moneys, securities and effects as shall be and remain after full payment of the several debts, legacies, annuities and other outgoings before mentioned, shall go to and become the property of my dear niece *Mary Lonsdale*, the wife of the said *William Lonsdale*, and shall be paid and payable to her half-yearly during the term of her natural life; and I therefore give and bequeath the residue of such annual profits and produce to her accordingly. And in the event of her death before her said husband, then I give and bequeath the same to him the said *William Lonsdale*, for and during the remainder of his natural life. And from and after the death of the said *William Lonsdale* and *Mary* his wife and the longer liver of them, then I authorize and direct my executors, or the survivor of them, to proceed to an equal division of all my real and personal estates and property, whatsoever, unto and *amongst all and every the children of my said niece Mary Lonsdale and their lawful issue, share and share alike*, as tenants in common and not as joint tenants, and to whom I give, devise and bequeath the same accordingly. But, nevertheless with this reservation and restriction as to

all

June 4.

A testator devised real and personal estate to *A.* for life, with a direction to the executors, after *A.*'s death, to divide it amongst all her children and their lawful issue, share and share alike." There was a gift over of the leaseholds to other persons on a total failure of issue of the children. Held, that the children took estates tail in the realty and absolute interest in the personalty, and that cross remainders were not to be implied in regard to the leaseholds.

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 v.
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all the leasehold buildings and premises which I have lately erected in *Buxton Road* in *Huddersfield* aforesaid, and called '*Johnson's Buildings*,' and as to which I direct and order that the same shall never be sold, but always remain unaliened and unalienable by them and their heirs, executors and administrators for ever, except as far as concerns themselves, and to and from one another only. And to that end and for that purpose, I will and order that each and every one of the future descendants and lawful issue of the said *Mary Lonsdale's* children shall always take their parents' shares and proportions of and in the same leasehold buildings and premises, or the rents and profits thereof, share and share alike, and in equal proportions. *And in default of issue of the said Mary Lonsdale and her children* and all their descendants without issue (if ever that event happens), and from and after the decease of the said *William Lonsdale* (to whom I have given a life interest therein), then and upon that event happening, but not otherwise, I give, devise and bequeath all the same leasehold buildings and premises and the rents and profits thereof, in three equal parts, unto my nearest of kin, the descendants of my three cousins, namely, *Rebecca Johnson* and *Ann Johnson*, both of *Halifax* aforesaid, (the daughters of my late uncle *William Johnson* formerly of that place,) and *Rebecca Johnson*, the daughter of my late uncle *Thomas Johnson* of *Leeds*, such descendants of each of my said three cousins and their lawful issue taking each equally in right of their respective parents. But, nevertheless, with, under and subject to the same reservation and restriction as to the non-sale and non-alienment of such leasehold buildings and premises called '*Johnson's Buildings*' as is mentioned in the bequest thereof made in favor of the children of my said niece *Mary Lonsdale*."

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The testator died in 1833, seised of freehold and possessed of the leasehold in *Johnson's Buildings*, and other personal estate.

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Mr. *Lonsdale* died in 1835, his widow, *Mary Lonsdale*, was still living, and was more than seventy years of age.

She had three children (all born in the testator's life), viz., the Plaintiff *William*, who had never been married; the Plaintiff *Anne*, who had four children, (all born after the testator's death,) and *Louisa*, who died in 1845, without having been married.

This bill prayed a declaration of the rights and interests of the parties to the real and personal estate of the testator. It stated that doubts had arisen as to the true construction of the testator's will; that the Plaintiffs were advised that *Mary Lonsdale* was entitled for her life to all the real estate of the testator and also to the leasehold premises called *Johnson's Buildings*, and all other the residuary personal estate of the testator, and that the Plaintiffs were entitled to such real estate as tenants in common in tail general in remainder expectant on the decease of the Defendant *Mary Lonsdale*, and were also entitled absolutely, as tenants in common, to two equal third parts of the said leasehold premises and other residuary personal estate, subject to the life interest therein of *Mary Lonsdale*.

It stated that the trustee had refused to convey and make over the real estate and leasehold premises and other residuary personal estate to *Mary Lonsdale* and the Plaintiffs, or according to their directions, and as a reason for his refusal asserted, that the four infant children of *Anne* were entitled to some estate or interest in the

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the real estate, leasehold and residuary personal estate of the testator.

Mr. *Baggallay* for the Plaintiffs. The gift among the children and their lawful issue, share and share alike, created an estate tail in the realty and an absolute interest in the personalty; *Martin v. Swannell* (a), where the gift, in default of appointment, of real and personal estate was to *P. E.* and *T.*, and their lawful issue, it was held to create an estate tail. So in *Parkin v. Knight* (b), where the direction was to divide realty and personalty among all my nephews or their lawful issue, the Vice-Chancellor having decided that "or" was to be read "and," held that the nephews took estates tail in the realty and absolute interests in the personalty. Here the testator intended to create a perpetuity in his family, and there is a gift over on a total failure of issue; this, therefore, by implication, creates cross remainders between the children.

Mr. *Follett* and Mr. *Druce*, for the children of *Anne*, argued, first, either that the children of the nieces took for life with remainder to their children in fee; *Jarman on Wills* (c); *Montgomery v. Montgomery* (d); or, secondly, that the parents and issue took concurrently; *Wild's Case* (e); and thirdly, that as to *Louisa's* share, there were cross remainders to be implied from the gift over in case all should die without issue; *Jarman on Wills* (f).

Mr. *Humphreys* for Mrs. *Lonsdale*. The gift over relates to the leaseholds only, and, therefore, no cross remainders

(a) 2 *Beavan*, 249.(b) 15 *Simons*, 83.(c) *Vol. 2*, p. 371 (2nd edit.).(d) 3 *Jones & Lat.* 47.(e) 6 *Reports*, 17.(f) *Vol. 2*, p. 457 (2nd edit.).

remainders can be implied as to the real estate. The children take estates tail in the realty and absolute interests in the personalty, for the word issue is a word of limitation and not of purchase. He cited *Tate v. Clarke* (a).

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The MASTER of the ROLLS.

I am clearly of opinion that an estate tail is given to the children of the nieces in the real estate, and an absolute interest in the personalty. That appears, not only from the words of the original limitation, but by the whole scope and purpose of the will (b).

I think cross remainders are only to be implied with respect to the *Johnson's Buildings* property.

Mr. *Baggallay*. That is personal estate.

The MASTER of the ROLLS. Then there are no cross remainders (c).

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| (a) 1 <i>Beav.</i> 100. | 335; <i>Baxter v. Losh</i> , 14 <i>Beav.</i> |
| (b) <i>Reg. Lib.</i> 1857, fol. 1701. | 612; 2 <i>Jarman on Wills</i> , 477 |
| (c) See <i>Skey v. Barnes</i> , 3 <i>Mer.</i> | (2nd edit.). |

1858.

June 11.

July 26.

In re PAYNE.

Bequest to *A.* for life, and afterwards to her children living at her death, with a proviso, that if any child "should acquire a vested interest," and should encumber the same before his share should become payable, it should not be paid to him or his incumbrancer, but to others. A child mortgaged his share in the life of *A.*, and survived her. Held, that the forfeiture took effect.

Bequest to *A.* for life, with remainder to her children living at her death, and their issue, the issue to take the share of a deceased parent, followed by a declaration that the children should take vested and transferable interests at twenty-one, or leaving lawful issue at the time of his decease before that age. A child attained twenty-one, and died in the life of *A.* without having had any issue. Held, that her representatives took no share.

THE testator gave a large sum in the funds to trustees, upon trust, as to one-third, to pay the dividends to his daughter *Catherine*, the wife of Mr. *Sills*, for her separate use for life; and after her decease, upon trust to pay a portion of the dividends to Mr. *Sills* for life or until bankruptcy, &c. and "to pay, assign, transfer and assure" the rest of the stocks and dividends unto all and every the children of *Catherine Sills* "that shall be living at the time of the decease of the said *Catherine Sills*, in equal parts, shares and proportions, and their issue respectively, in such manner that they may take their respective shares as tenants in common, if there shall be more than one, and the issue of any such children to take such part or share as their parent would have taken if living; and in case there shall be but one such child, or the issue of only one child living at the time aforesaid, then to such one or only child, his or her issue."

Upon the death or bankruptcy, &c. of Mr. *Sills*, the testator gave the proportion payable to him to the children of *Catherine Sills* and their issue in similar terms.

The testator declared, that the shares of sons should be "paid, transferred or assigned at their ages of twenty-one, and of the daughters at that age or marriage, whichever should first happen, unless that should occur

in

in the life of his daughter or her husband." He then proceeded thus:—"And I will and direct, that the said part or share or parts or shares of such children or child of my said daughter, of and in the said stocks, funds and securities, shall become a vested and transferable interest in each of the children of my said daughter, being a son, upon and immediately after his attaining his age of twenty-one years, or leaving lawful issue at the time of his decease before that age; and in each of them, being a daughter, on her attaining the age of twenty-one years or day of marriage, but no sooner or otherwise."

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PAYNE.

The will contained a proviso, that if any of the children of *Catherine Silts*, "being a son, should depart this life under the age of twenty-one years, without leaving lawful issue, or, being a daughter, should depart this life under that age, and unmarried," his or her part or share should accrue to the surviving children, and be vested and payable as their original shares.

And the testator declared, that if any child or children of his daughter "then born, or at any time thereafter to be born, *should acquire a vested interest*, and should sell and dispose of, or charge or incumber the same, to any person or persons whomsoever, or in any manner howsoever, before his or their respective share or shares should have become payable or transferable under the trusts aforesaid, that share or shares should not be paid to such child or children, or to any person or persons to whom or in whose favor such share or shares should be so sold or disposed of, or charged or incumbered, but should, in such case, go and be paid to the issue of such child or children so charging, selling or incumbering, as and when the same should become payable. And if there should be no issue of such child

or

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or children so selling, charging or incumbering, then such share or shares so sold, disposed of, charged or incumbered, or meant or intended so to be, should be subject to such benefit of survivorship," between the other children, as thereinbefore declared touching their original shares in case of the death of any of them without issue.

The testator died in 1822; his daughter *Catherine* survived her husband Mr. *Sills*, and died in 1857.

In 1852, *William*, one of the children of *Catherine*, mortgaged his interest under the will for 772*l.* to *Geary*, who, in 1858, transferred the security to *Moss*. This gave rise to the first question as to forfeiture.

Mary Elizabeth, another of the children of *Catherine Sills*, attained twenty-one and married, and she afterwards died in 1829, without having had any issue. This gave rise to the second question, as to her representatives being entitled to participate in the fund on her mother's death.

The case first came before the Court on the 11th of *June*, 1858, upon the petition of *Moss*, the incumbrancer of *William*, praying payment of the mortgage out of the share of *William*. On this occasion, two points were argued: first, whether the clause of forfeiture was effectual, and, secondly, whether the gift to the issue was too remote. As to remoteness, *Greenwood v. Roberts* (a) was cited; and as to the condition being void, *Bradley v. Peixoto* (b); *Rishton v. Cobb* (c); *Rochford v. Hackman* (d) were referred to.

The

(a) 15 *Beav.* 92.
(b) 3 *Ves.* 324.

(c) 5 *Myl. & Cr.* 145.
(d) 9 *Hare*, 480.

The MASTER of the ROLLS said, he was of opinion that the limitation to the children and their issue was not too remote; for although there was a gift to issue, however remote, still, as all the persons to take must be ascertained at the death of *Catherine Sills*, the gift was valid. He also said, he was of opinion that the clause of forfeiture was operative.

1858.

In re
PAYNE.

This case came before the Court a second time on the 26th of *July*, 1858, upon the petition of the representatives of *Mary Elizabeth*, who attained twenty-one, married, and died without issue in the life of her mother. The Petitioner (her administrator) claimed a share of the fund in her right.

Mr. *Shebbeare*, in support of the petition, argued that the shares vested in daughters on their attaining twenty-one or marrying. He relied on *Riley v. Garnett* (a); *Doe d. Roake v. Nowell* (b); *Phipps v. Ackers* (c); *Browne v. Browne* (d); *Strother v. Dutton* (e).

Mr. *Lloyd*, Mr. *Schomberg* and Mr. *Currie* were not heard.

The MASTER of the ROLLS.

On the construction of this will I think there can be no doubt. There is a gift of one-third of the fund to *Catherine Sills* for life, and on her death, in trust to pay it to her children "that shall be living at the time of the

(a) 3 *De Gex & Sm.* 629.

(b) 1 *Maule & S.* 327.

(c) 9 *Clark & F.* 583.

(d) 3 *Jurist*, N. S. 728.

(e) 1 *De Gex & J.* 675.

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In re
PAYNE.

the decease of the said *Catherine Sills*, in equal parts, shares and proportions, and their issue respectively," the issue to take the share of their deceased parent. It is obvious, on these words, that one thing was essential, either that the child should be living at the decease of *Catherine Sills*, or have predeceased her and left issue. So that, on the death of *Catherine Sills*, these funds were to be divided into as many shares as there were surviving children and deceased children who had left issue.

This will is perfectly clear so far; but I am referred to different parts of the will, to shew that these words are afterwards controlled. If it could be shewn, by the subsequent words, that the children were to take vested interest at twenty-one or marriage, no doubt the Court would give effect to it and control the preceding words accordingly; but the subsequent clauses are every one of them referable to the class previously described who are to take, namely, those living at the death of *Catherine*.

It is said, that the testator has declared that the shares shall be vested in sons at twenty-one, and daughters at twenty-one or marriage; but the class being ascertained at the decease of *Catherine*, it is perfectly consistent that the individuals shall take vested interests at that period. Again, it does not say that all the children shall take vested interests at that period, but that "such children," namely, those before described as living at the decease of *Catherine*, shall take vested shares. The clause is perfectly consistent with this:—that on the death of *Catherine*, the children who have survived her will either have obtained vested interests by attaining twenty-one or being married or they have not, and if they have not, then they are to take vested interests on the happening of those events.

The

The clause of forfeiture does not affect the case.

1858.

In re
PAYNÉ.

It is important to bear in mind two things: first, who are the persons that constitute the class that takes; and, secondly, at what time and under what conditions those persons take vested interests. Here the testator, in the first part of his will, defines the class, and in the latter part he describes the periods of vesting. I will make a declaration, that the daughter, having died in the life of her mother, her share went over, and then direct the costs to be paid out of the fund.

SHEA v. BOSCHETTI.

In re PEILE.

MESSRS. *Thomas Peile* and *Rowland Peile* were the solicitors for the Plaintiff. In 1856, they took the benefit of the Insolvent Act. Mr. *England* was the creditors' assignee of *Thomas Peile*, and Mr. *Sturgis* was the provisional assignee of *Rowland Peile*, no creditors' assignee of *Rowland Peile's* estate having been appointed.

May 24, 25.
Assignees in insolvency of solicitors ordered to pay the costs of taxation, more than one-sixth having been taxed off a bill of costs delivered by them.

The Plaintiff presented a special petition for the delivery and taxation of his solicitor's bill, and by an order of the 4th of *July*, 1857, *Thomas* and *Rowland Peile*, and Mr. *Sturgis* and Mr. *England*, were ordered to deliver a bill of costs, which was referred for taxation. Nothing was said as to costs, the further hearing of the petition having been ordered to stand adjourned until the result of the taxation should have been certified.

The

1858.

SHEA

v.

BOSCHETTI.

In re

PEILE.

The Master taxed off more than one-sixth from the bill as carried in, and in the result a balance was found due to the client.

The petition came on for further hearing.

Mr. *R. Palmer* and Mr. *Bagshawe*, jun., for the Plaintiff, asked for the costs.

Mr. *Follett* argued, that the ordinary rule was inapplicable to the present case, especially as the order for taxation omitted the usual clause as to the costs.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

May 25.

I am of opinion that the costs of taxation must be paid by the assignees. If less than one-sixth had been taxed off, I should have made the Petitioner pay the costs, and the assignees must stand in the same situation. They had the same power of judgment as the Petitioner, and having failed, they must pay the costs of the taxation.

NOTE.—See 6 & 7 Vict. c. 73, s. 36.

1858.

WARD v. TYRRELL.

THE testator *David M'Intosh* expressed himself as follows :—

“ I give, devise and bequeath unto my uncle *James M'Intosh* and to *Timothy Tyrrell*, of *Guildhall*, in the city of *London*, gentleman, all my real and personal estates and effects, whatsoever and wheresoever, to hold the same unto them, their heirs, executors, administrators and assigns, according to the nature thereof, in the first place to pay and satisfy, thereout, all my just debts, funeral and testamentary expenses ; and subject thereto, I direct that they and the survivor of them will divide the same among my first cousins, as they or he may, in their uncontrolled discretion, think proper, *by dividing the whole equally among them or between two or more of them or giving the whole to any one of them*, and for such estate or estates, interest or interests, and with, under and subject to such powers, discretions and limitations as my said trustees or trustee may think proper, so that the same are in favor of some one or more of my said first cousins or their descendants. And I do hereby appoint my said uncle *James M'Intosh* and the said *Timothy Tyrrell* executors of this my will.”

The testator died on the 7th of *January*, 1856, and *James M'Intosh* having died in the testator's lifetime, *Timothy Tyrrell* alone proved his will.

By

have an appointment, under a discretionary power, declared invalid, a subsequent appointment *pendente lite* upheld.

June 23.

A testator directed his trustees to divide his property “ among his first cousins, as they might, in their uncontrolled discretion, think proper, by dividing the whole equally among them or between two or more of them, or giving the whole to any one of them, and for such estate or estates, interest or interests, and with, under and subject to such powers, discretions and limitations as they might think proper, so that the same were in favor of some one or more of his first cousins or their descendants.” Held, that the trustees could not appoint to the cousins in unequal shares.

In a suit to

1858.

 WARD
 v.
 TYRRELL.

By deed poll, dated the 3rd of *April*, 1856, *Timothy Tyrrell* appointed different sums, such as 100 guineas, 50 guineas, 50*l.*, 20*l.*, an annuity of 300*l.* a year, &c. to different first cousins of the testator, and sums of 1000*l.*, each, to others, to be settled on them and their children, and he appointed the residue of the testator's estate to a first cousin named *David M'Intosh*, absolutely.

The Plaintiff *Mrs. Ward*, a first cousin of the testator, to whom a sum of 20*l.* had been appointed, instituted this suit in 1856, impeaching the validity of the appointment and objecting thereto, on the ground that the division, so made, was not a division of the whole of the real and personal estate *equally* among the testator's first cousins, or between two or more of them, and that the trustee has not given the whole to any one of them.

After the filing of this bill, and by a deed poll dated the 6th of *April*, 1857, the Defendant *Tyrrell* appointed all the real and personal estate of the testator unto *David M'Intosh* absolutely, with a declaration by the Defendant, that he would stand possessed thereof upon trust for *David M'Intosh*, and a proviso, that the same should be without prejudice to the first deed poll, if valid, and should operate only in case the same deed poll should be declared, by the decree of this Court, to be wholly or to some extent invalid.

By amendment, the Plaintiffs also impeached the validity of the second deed.

Mr. *R. Palmer* and Mr. *W. D. Lewis*, for the Plaintiff, argued that the word "equally" governed the shares
 given

given to the first cousins, and that any unequal appointment to cousins was invalid. That the power had not been validly executed, and that in default of appointment, there was an implied gift to the first cousins equally. They also questioned the second appointment, made *pendente lite*.

1858.
WARD
v.
TYRRELL.

Mr. Lloyd and Mr. Rodwell, for Tyrrell (the sole Defendant), supported the first appointment, and contended that, at all events, the second was valid. They argued that an equality was inconsistent with the power of giving to the cousins such estates and interests in the shares as the trustees might think proper, for this, if acted on, must necessarily introduce an inequality. They also argued, that the first appointment was, in substance, the gift of the whole to one, subject to an exception as to part only.

The MASTER of the ROLLS.

It is not the province of this Court to make wills rational, its only duty is to expound them, and where there is any ambiguity, to explain what the testator really meant. The Court, when the meaning is ascertained, is bound to carry it into effect, however capricious it may be, provided it be not contrary to law.

Judging from the general scope and purport of the will, I should infer that the testator would have better accomplished his object by giving to the trustees the most uncontrolled discretion in the division of his estate, not merely as to the shares to be appointed to the first cousins, but also as to the interests in the shares which were to be taken by them and their descendants.

1858.

WARD

v.
TYRNELL.

Two things are always to be borne in mind in this and in every other bequest and limitation of property; first, what is the subject-matter of the gift; and, secondly, what are the interests given. Here the subject-matter given and the objects to take are quite clear. The trustee is to divide it amongst the first cousins. In what shares can he divide it amongst them and what interest can he give them in those shares? He can give them these shares;—he may divide the property equally amongst them or between two or more of them;—or he may give the whole to any one of them. It is impossible to read these words without seeing they mean that the whole property is to be given either to one, or that there is to be an equal division amongst such two or more of them as the trustee might select; the word “equally” clearly governs the whole of the division, and the testator nowhere authorizes the trustee to give the property to several in unequal shares. But the trustee might have done this:—he might have divided the property amongst all the cousins equally, and then, under the subsequent words, “and for such estate or estates, interest or interests, and with, under and subject to such powers, discretions and limitation as the said trustee or trustees may think proper, so that the same are in favor of some one or more of my said first cousins or their descendants,” he might have given a share to one of the first cousins for life, and after his death to another first cousin absolutely, and in that case, it might have occurred, that one first cousin, by surviving another, would have taken a greater interest than another. But bearing in mind the distinction between the objects which are certain and the shares which are to be equal, the only thing the trustee had power to do was, to select which of the first cousins he thought fit to take equal shares in the whole of the property.

I am

I am of opinion, that the first appointment was not a valid appointment. I think it impossible to accede to the argument, that because he has given to several of them small shares of the property, the appointment is to be treated in the same way as if he had given the whole to one, subject to certain interests. In one sense, you may say he has given the whole to one, with the exception of a certain portion; but that is only another mode of stating the argument. In my opinion, the testator has precluded the possibility of the donee of the power doing that, and he was bound either to give the whole to one, or to give it equally amongst such objects of the power as he thought fit to select.

I am clearly of opinion, that the second appointment is a good execution of the power. The trustee had an uncontrolled discretion, which this Court could not interfere with, nor itself make the equal division, unless the trustee absolutely refused to exercise the discretion.

All parties must have their costs.

1858.

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v.
TYRELL.

1858.



COLE v. WILLARD.

June 24, 25.

The testator, on his marriage, covenanted that his representatives should, within three months after his decease, pay 2,000*l.* to trustees, to be held for his wife for life. By his will, after directing all his debts to be paid, he gave his widow an annuity of 200*l.* a year, payable quarterly, and other benefits. Held, that the provision for the wife, under the settlement, was not satisfied by the provision made for her by the will.

The authority of *Wathen v. Smith*, 4 *Mad.* 325, impugned.

ON the marriage of Mr. *Willard* the testator, an indenture, dated in 1808, was made between Mr. *Willard* of the first part, *Harriet Alice*, his intended wife, of the second part, and trustees of the third part. It recited the intended marriage, and that Mr. *Willard*, by bond of even date, had bound himself unto the trustees in the penal sum of 4,000*l.*, subject to a condition for making it void, if the heirs, executors or administrators of Mr. *Willard* should, within three calendar months, to be computed from his decease, pay unto the trustees the sum of 2,000*l.* And it was thereby declared, that the trustees should get in and receive the 2,000*l.* secured by the bond, and should invest the same in the public funds or upon government or real security in *England*, and pay the interest to *Harriet Alice* and her assigns, or permit her and them to receive the same, for her and their own use and benefit, during the term of her natural life, and from and after her decease should stand possessed thereof in trust for the executors or administrators of Mr. *Willard*. The settlement contained a covenant by Mr. *Willard* with the trustees for payment of the 2,000*l.* upon the trusts aforesaid, according to the condition of the recited bond. The provisions of the settlement were in bar of dower.

By his will, dated in 1855, Mr. *Willard* gave all his real estate to his wife for life, with remainders over, and he then proceeded thus :—" *I direct all my just debts and funeral and testamentary expenses to be paid out of my personal estate, as soon as conveniently may be after*
my

my decease;" and, after giving his leasehold messuage to his wife for her life, and all his household goods, he proceeded as follows:—"I give unto my dear wife one annuity of 200*l.* sterling during her life, to be paid by four equal quarterly payments, on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December*, in every year, the first payment thereof to be made on such of the said days as should first happen next after my decease, and a proportion of the said annuity up to and inclusive of the day of her death. And he directed his executors to retain, out of his personal estate, and to place out at interest on government or real security, such sum or sums of money as would be sufficient, by means of the annual dividends or interest to accrue thereon, to pay the same annuity, and in the meantime and until such investment, to pay the annuity out of his general personal estate. And after similar bequests, he gave the residue of his personalty to his wife for life, with remainders over.

1858.

 COLÉ
 v.
 WILLARD.

The marriage settlement was not referred to in the will, and there was no parol evidence of any declarations of the testator.

The testator died on the 12th of *March*, 1856, leaving his wife surviving.

This suit was instituted by two of the executors for the administration of the estate, and the bill stated, that it was alleged, by some of the Defendants, that the bequest of an annuity of 200*l.*, contained in the will, was intended by the testator and ought to be considered and taken as in lieu or satisfaction of the life interest of *Mrs. Willard* in the sum of 2,000*l.* secured by the bond.

Mr.

1858.

Mr. *Shebbeare*, for the Plaintiffs, stated the case.

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Mr. *Shapter* and Mr. *J. H. Palmer* for the widow. The testator, in bequeathing the annuity of 200*l.*, and other income, to his wife, must be presumed to have intended bounty, and not a satisfaction of a legal obligation; and more especially as he has also directed all his debts to be paid, as soon as conveniently might be.

It will be said, on the authority of *Edmunds v. Low* (a), that the direction to pay *debts* is not sufficient to rebut any presumption of satisfaction; and that a direction to pay *debts and legacies* is necessary for that purpose; but it is clear, on the authorities, that a simple direction to pay all his *debts* is alone sufficient; *Hales v. Darell* (b); *Jefferies v. Michell* (c); *Rowe v. Rowe* (d). The direction to pay legacies conveys to the mind no force additional to that which is expressed by the mere gift of the legacy.

Wathen v. Smith (e) may be cited, to shew that, in consequence of the similarity of the provisions, the annuity given by the will must be deemed a satisfaction of the obligation entered into on the marriage; but in that case there was an *identity* of provision, which is absent in the present case.

Mr. *Lloyd* and Mr. *Cary* for the residuary legatees. The provision made by the will is identical with that made by the settlement, in this respect, that it includes everything given by the settlement, and even confers
greater

(a) 3 *Kay & Johnson*, 318.
(b) 3 *Beav.* 324.
(c) 20 *Beav.* 15.

(d) 2 *De Ges & Sm.* 294.
(e) 4 *Madd.* 325.

greater benefits. The charge of *debts* alone does not rebut the presumption of satisfaction. The testator has ceased to consider the debt as such, when he has satisfied it by a legacy; but, if he directs payment of debts and legacies, he intimates an intention that both shall be paid, not only that which is an obligation, as a debt, but also that which is a bounty, as a legacy; *Chancey's Case* (a); *Edmunds v. Low* (b). *Wathen v. Smith* (c) governs this case, and is even stronger. There, a husband covenanted to pay 1,000*l.* within six months after his death, in trust for his widow; and by his will, he gave her 1,000*l.*, to be paid within three months; and he directed his executors, *in the first place*, to pay "all his just debts" and "legacies." Sir *John Leach*, then Vice-Chancellor, considered, that "the intention to perform the covenant was to be presumed, unless there were special circumstances to repel the presumption;" and on a subsequent day, he stated his opinion to be, "that the legacy was a satisfaction of the covenant, and that it could not be considered to be within the intention of the testator when he made a provision by his will for the payment of debts." *Wathen v. Smith* (c) was more favorable to a double claim than the present case; for, in that case, there was a direction to pay, not only all his *debts*, but his *legacies*; but here, the direction is to pay *debts* alone. Moreover, the direction to pay debts is of no importance here, for, as was observed in *Wathen v. Smith*, the testator did not mean to include, under the term "debts," obligations entered into by his marriage settlement, which did not become payable until after his death, but debts, in their proper sense. They also cited *Fowler v. Fowler* (d); *Fourdrin v. Gowdey* (e).

1858.

COLR
v.
WILLARD.

Mr.

(a) 1 *P. Wms.* 408.(b) 3 *Kay & Johnson*, 318.(c) 4 *Madd.* 325.(d) 3 *P. Wms.* 354.(e) 3 *Myl. & K.* 409.

1858.



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WILLARD.

Mr. Shapter in reply.

The MASTER of the ROLLS.

I will mention this case to-morrow. I do not at present see how I can get over *Wathen v. Smith*, which appears exactly in point, and unless I should think that I cannot follow it, the result will be the same here as in that case.

Chancey's Case (a) seems to lay down, that when there is a direction that the debts and legacies shall be paid, then after the debts are paid, the legacies shall also be paid. I took the same view in the case of *Jefferies v. Michell* (b), and the Vice-Chancellor *Knight Bruce* did the same in *Rowe v. Rowe* (c); but Sir *John Leach* seems to have been of opinion, that a covenant by a testator, that his representatives should pay a sum within six months after his decease, did not constitute one of his debts, within the meaning of a direction in his will to pay "all his debts, funeral and testamentary expenses, and any legacy given by his will." I have a great difficulty in seeing the distinction; nor can I understand why such an obligation, on the part of a testator, is not a debt like other debts; it was for the highest consideration, viz., marriage. A covenant in a lease would be a debt, though the breach occurred after the testator's death. In *Wathen v. Smith* the judgment of the Court is very lightly reported.

The MASTER of the ROLLS (d).

June 25.

I do not concur with Sir *John Leach* in his observation in *Wathen v. Smith*, that the testator must not be understood

(a) 1 P. Wms. 408.

(b) 20 Beav. 15.

(c) 2 De Gex & Sm. 294.

(d) *Ex relatione*.

understood to include under the word "debt" his liability on bond or covenant made on his marriage, although to be discharged after his decease.

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COLE
v.
WILLARD.

It seems to me, that a charge of debts, whether standing alone or accompanied by a charge of legacies, is of equal force on the question of rebutting the presumption of satisfaction; and I observe that Sir *John Leach*, in referring to *Chancey's Case* in *Wathen v. Smith*, speaks of it as directing a payment of debts; deeming, I presume, the circumstance, that it also directed a payment of legacies, unimportant.

However, without observing further on the authorities, I am satisfied, on a perusal of the will, that the testator meant bounty and not satisfaction. The provisions are not identical, and though similar, he makes a provision for his grand-daughter *Mary Alice Evans* more closely resembling that which by his settlement he had undertaken to make for his wife, and yet he makes for his wife a provision by will different to that which he had undertaken to make by his settlement.

I must declare, that this legacy is not a satisfaction, and that the widow is entitled to the benefit of the settlement as well as to the provisions for her benefit contained in the will.

1858.



CAMBRIDGE v. ROUS. (No. 2.)

June 25.

Money in Court stood limited to a widow for life, and afterwards as she should by deed or will appoint. The Court directed payment to her, without requiring an appointment.

MRS. *Pender* married in 1824, and upon that occasion, all the personal estate to which she "then was or thereafter might be entitled unto, in any manner whatsoever," was settled.

Mrs. *Pender*, who was now a widow, had become entitled to one-fourth of one-seventh of the fund in Court in this suit, and, in the events which had happened, the trusts of the settlement were to pay the income to Mrs. *Pender* for life, and hold the property upon such trusts and pay the same to such persons as she should, by deed or will, appoint. There was no gift over in default of appointment.

In drawing up the decree, a question arose, whether it might direct payment to her of the funds, without an appointment being made by her.

Mr. *Osborne* now submitted that it might be done on the authority of *Holloway v. Clarkson* (a).

The MASTER of the ROLLS concurred in that decision, and directed payment to Mrs. *Pender*.

(a) 2 Hare, 521.

1858.

HUGHES v. HOWARD.

IN 1852, leases of two houses were granted for terms of eighty years, at rents of 10*l.* each, by indentures dated in that year.

On the 22nd of *December*, 1854, (when a suit, after referred to, was instituted,) the interests in these leases were as follows:—They were mortgaged, first, to the Plaintiffs for 900*l.*; secondly, to *Howard*, and the equity of redemption was vested in *Naylor*, who had taken an assignment of the equity of redemption of the leases subject to the mortgages, under arrangements by which *Howard* and *Dollman* were to share in the profit.

Howard and *Dollman* were attorneys and partners, and *Naylor* their clerk.

In this state of circumstances, on the 22nd of *December*, 1854, the Plaintiffs (the first mortgagees) filed their bill of foreclosure against *Naylor*, *Howard* and *Dollman*, and on the 15th of *January*, 1856, the usual decree was made, whereby *Dollman*, on his disclaimer, was at once foreclosed, and in default of *Howard* and *Naylor* paying the amount due to the Plaintiffs, they also were to be foreclosed, at different periods limited for

July 2.
The Defendants, who were entitled to the equity of redemption of leaseholds charged with a mortgage, attempted to get rid of it by fraudulently incurring a forfeiture, which they induced the lessor to take advantage of. They afterwards obtained a new lease from him, which they sold. Held, that the new lease was subject to the mortgage, notwithstanding the 15 & 16 *Vict.* c. 76, ss. 210, and a decree was made for payment by the Defendants of the mortgage with costs.

The costs of Defendants dismissed pending the suit, on their being ascertained to be purchasers for value without

DATES.	
1854, <i>Dec.</i> Foreclosure bill.	1856, <i>Jan.</i> Decree and <i>Dollman</i> foreclosed.
1855, <i>Mar.</i> Judgment in ejectment.	<i>Feb.</i> New lease.
<i>Nov.</i> Possession.	<i>Nov.</i> <i>Howard</i> foreclosed.
	1857, <i>Mar.</i> <i>Naylor</i> ditto.

notice, were ordered, at the hearing, to be paid by the principal Defendants.

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v.
HOWARD.

that purpose. Under this decree, *Howard* was absolutely foreclosed on the 4th of *November*, 1856, and *Naylor* on the 7th of *March*, 1857.

Apparently, therefore, the Plaintiffs thereupon became absolute owners of the leasehold property; but on their going to take possession, they discovered that the lease had been forfeited pending the foreclosure suit by the means following:—During that period, *Howard* and *Dollman* had announced to the landlord, an old client of their firm, that no further rent would be paid, and *Dollman* advised the landlord to consult an attorney named *Jones*, a friend of his, but who was unknown to the landlord. The landlord accordingly applied to *Jones*, and under his guidance, there being half a year's rent in arrear, and the premises being vacant, the landlord proceeded, under the 210th section of the Common Law Procedure Act, 1852, to eject and determine the lease.

By this statute (a) it is enacted, that “In case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity, within six months after such execution executed, then and in such case, the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy *in law or equity*, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall, from henceforth, hold the said demised premises discharged from such lease.”

No notice of these proceedings at law was given to the

(a) 15 & 16 *Vict. c. 76, s. 210.*

the Plaintiffs, and on the 14th of *March*, 1855, the landlord recovered judgment, and he took possession on the 27th of *November* following. *Naylor*, being dissatisfied with his position in the affair, obtained from *Dollman* an indemnity against the liabilities which he had incurred by becoming assignee, and he assigned the forfeited leases to *Dollman*, *Howard* joining in the assignment, and confirming it. On the 14th of *February*, 1856, the landlord, on the application of *Howard*, granted new leases of the property to him, for the same terms, at the same rents, and under the same covenants and conditions, as those contained in the forfeited leases. *Howard* was a trustee and acted on behalf of himself and *Dollman*.

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HOWARD.

After this, *Howard*, with the concurrence of *Dollman*, sold the new leases.

Under these circumstances, the Plaintiffs, on the 23rd of *March*, 1857, filed the present bill against *Howard* and *Dollman*, and the purchasers of the property from them, to recover from *Howard* and *Dollman* 1,104*l.* 19*s.* 5*d.* (the principal, interest and costs found due to them in the foreclosure suit), together with subsequent interest thereon, and the costs of suit; or, in the alternative, to set aside the proceedings as fraudulent, and obtain an assignment of the new leases.

The purchasers from *Howard* and *Dollman* put in answers, to the effect, that they purchased for value without notice, and thereupon the Plaintiffs dismissed them from the suit, and paid their costs.

It appeared from the answers that the profit made by the sales, after deducting the expenditure on permanent improvements since the renewal, was less than the 1,104*l.* 19*s.* 5*d.*

The

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 HOWARD.

The cause now came on for hearing against *Howard* and *Dollman*.

Mr. *Roundell Palmer*, Mr. *Shapter*, and Mr. *Speed*, for the Plaintiffs. A renewal of or a graft on a lease, procured honestly, is subject to all the equities of a forfeited or expired lease; *Seabourne v. Powel* (a); *Jones v. Kearney* (b); *Otter v. Vaux* (c); a renewal procured dishonestly is not less so. The bar to relief in equity, mentioned in the 210th section of the Common Law Procedure Act, is only as regards the landlord and those claiming under him, and not as regards a lessee fraudulently forfeiting a lease and obtaining a renewal; *Nesbitt v. Tredennick* (d).

Pending the foreclosure suit, *Howard* and *Dollman* took an assignment from *Naylor* of all his interest, they, therefore, became the sole owners of the equity of redemption, and were bound by the decree of foreclosure in favor of the Plaintiffs.

As the profit made by the Defendants by the sale of the renewed leases (which in equity were the property of the Plaintiff) is less than the mortgage debt, the Plaintiffs ask for payment, by the Defendants, of the 1,104*l.* 19*s.* 5*d.*, and interest and costs, including what they have paid to the dismissed Defendants.

Mr. *Selwyn*, Mr. *Greene* and Mr. *Hallett*, for the Defendants. The Defendants ceased to have any interest in the leasehold property when foreclosed, and the leases of the 14th of *February*, 1856, which are called by the Plaintiffs renewals, are, in fact, quite new titles, which
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(a) 2 *Vern.* 11.

(b) 1 *Drury & Warren*, 134.

(c) 6 *De Ger, M. & G.* 638.

(d) 1 *Ball & Bent.* 29.

the Defendants had a right to acquire and afterwards to deal with. As the Plaintiffs did not proceed in equity, according to the exigencies of the 210th section of the Common Law Procedure Act, 1852, they have no remedy; *Nesbitt v. Tredennick* (a).

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The Defendants were not mortgagors, and they never contracted with the Plaintiffs to pay them the mortgage debt; they were interested only in the equity of redemption subject to the mortgage debts, and they had a right to abandon that interest.

The suit is, in effect, merely one for damages, and the Plaintiffs' bill should be dismissed with costs; *Nokes v. Fish* (b). They also cited *Wood v. The Marquis of Londonderry* (c); *Giddens v. Dodd* (d).

The MASTER of the ROLLS.

In this case, I am of opinion, that the evidence has established a very gross case of fraud, for which I have neither heard any species of excuse advanced, nor do I believe that any is capable of being offered. In substance, the case is shortly this:—A person, who becomes the assignee of a leasehold, subject to a mortgage upon it, finding, no doubt, as he himself says, that the mortgage upon the property was a very onerous one, and that it was a *damnosa hæreditas*, induces the lessor, who happens to be his friend and client, to take advantage of a forfeiture, which was committed by the lessee expressly for that purpose; and after the forfeiture is complete, he induces the lessor to grant him a new lease of the property on the same terms. Accordingly
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(a) 1. *Boll & Beatty*, 29.
 (b) 3 *Drewry*, 735.

(c) 10 *Beav.* 465.
 (d) 3 *Drewry*, 485.

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by this device, he obtains the present lease from his friend, the lessor, whom he induced to take advantage of the forfeiture, discharged from the mortgage of 900*l.*, and by spending 200*l.* more upon the property, he sells the new lease for 1,275*l.*

Such is the short statement of the case. Can it reasonably be supported in any court of justice? and is it not one which every court of justice will seriously reprobate? Not only was no notice given to the Plaintiffs of the proceedings to forfeit the lease, but it is clear that great care was taken to give none, and to pretend that the property was given up because it was a *damnosa hæreditas*; which no doubt was true, while the mortgage was upon it. The mortgage is attempted to be got rid of, and then it is made worth something like the value of the mortgage without reckoning the additional outlay upon it.

It is useless to comment further on such a case: it is clear, that this Court must make a decree for the payment of the money found due upon the mortgage, with interest, and the costs of the suit, including those of the Defendants who have been dismissed, which the Plaintiff must be at liberty to add to his own costs.

1858.

In re MOREY'S PATENT.

IN 1849, *Morey* obtained a patent for making a sewing machine.

On the 13th of *January*, 1851, *Morey*, in consideration of 200*l.*, assigned one-half the patent to *Mather*, and on the next day (14th of *January*, 1851) another agreement was entered into between them, whereby *Mather* was to have the sole right of making the machines, and the prices to be charged for the machines and for the right of user of them were regulated between them.

Mather neglected to register the assignment of the 13th of *January*, 1851, in the register of proprietors in the great seal patent office, until the 5th of *August*, 1857.

In the meantime, on the 21st of *June*, 1853, there was registered, in the register of proprietors, an indenture of the 4th of *February*, 1853, whereby *Morey* assigned the whole patent to *Johnson*, in consideration of 800*l.* This deed recited *Johnson's* agreement to purchase from *Morey* the patent and all his rights thereunder, "*save and except a licence to work and use a portion of the said invention, which is described or referred to in the specification thereof, with reference to a drawing marked A, already granted to Mather, of Manchester, in the county of Lancaster, machinest.*"

June 2, 3.
As to the jurisdiction of the Court to "expunge, vacate and vary" entries on the "Register of Proprietors" of patents under the 15 & 16 of *Vict. c. 83*, s. 38.

The Court can, on motion, expunge an entry fraudulently made, and can direct any facts relating to the proprietorship to be inserted on the register; but not the legal inferences to be drawn from them.

A patentee assigned half the patent to *A.*, and afterwards he assigned the whole to *B.*, by a deed, reciting that he had already granted a licence to work and use to *A.* *B.'s* assignment was first registered.

A motion Held, that *B.* had construc-

tive notice of *A.'s* rights, and an entry was ordered, on motion, to be made in the register that the licence referred to in *B.'s* assignment was the deed of assignment to *A.*, subsequently entered.

1858.

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*In re*  
**MOREY'S**  
**PATENT.**

A motion was now made, on behalf of *Mather*, under the 15 & 16 *Vict.* c. 83, s. 38, that the entry on the register of the deed of *February*, 1853, might be expunged or vacated, or that it might be varied, by restricting the same to one moiety of the patent, and as to such one moiety, subject to the memorandum of the 14th of *January*, 1851.

*Mr. Roundell Palmer*, *Mr. Jessel*, and *Mr. Aston*, in support of the motion, relied on the 15 & 16 *Vict.* c. 83, ss. 35, 38, and *Re Green's Patent* (a). They contended that the recital in the deed of 1853, gave *Johnson* notice of *Mather's* rights in the patent. On this point they cited *Daniels v. Davison* (b); *Allen v. Anthony* (c); *Barnhart v. Greenshields* (d); *Knight v. Bowyer* (e); *Penny v. Watts* (f).

*Mr. Selwyn* and *Mr. Cotton* argued, that the Court had no power, under the act, to exercise a summary jurisdiction in this case, where the rights of the parties depended upon a complicated state of circumstances, upon conflicting testimony, and the determination of a nice point of law as to notice. That the Respondent had, at law, the legal right to the patent; *Chollet v. Hoffmann* (g); and ought not to be deprived of it upon motion, especially as he had a counter equity against the applicant, who had been guilty of great negligence and laches, in not registering the first assignment until more than six years after its execution.

#### *The MASTER of the ROLLS.*

Before I hear a reply, it may be convenient to state the difficulty I feel, as to the species of entry which ought

(a) 24 *Beav.* 145.(b) 16 *Ves.* 249; 17 *Ves.* 433.(c) 1 *Mer.* 282.(d) 9 *Moore, P. C.* 32.(e) 23 *Beav.* 609.(f) 1 *Mac. & G.* 150.(g) 3 *Jurist* (N. S.), 935.

ought to be made on the register ; but I am of opinion that it is established that the applicant is entitled to have some entry inserted on it.

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In the first place, I find that this Act of Parliament requires, that the book called "The Register of Proprietors" shall contain the assignment of any patent or any interest therein, " with the name or names of the persons having any share or interest in such letters patent or licence, the date of his or her acquiring such letters patent, share and interest, and any other matter or thing relating to or affecting the proprietorship in such letters patent or licence." It is clear, therefore, to my mind, that the legislature intended that this book should contain not merely a register of documents, but any other fact which the Court or the commissioners should think it desirable should be entered on the register. I certainly think that the manner in which the commissioners are to direct it must be by a general rule, and not by separate directions, each applicable to the particular case.

Then comes the 38th clause, which states, " that if any person shall deem himself aggrieved, by any entry made under colour of this act, in the said register of proprietors, it shall be lawful for such person to apply, by motion, to the Master of the Rolls, or to any of the Courts of Common Law at *Westminster* in Term time, or by a summons to a judge of any of the said Courts in Vacation, for an order that such entry may be expunged, vacated or varied ; and upon any such application, the Master of the Rolls or such Court or judge respectively may make such order for expunging, vacating or varying such entry, and as to the costs of such application, as to the said Master of the Rolls or to such Court or judge may seem fit." I concur in the observations  
made

1858.

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In re
MOREY'S
PATENT.

made on behalf of the Respondent to this extent : that the Court cannot go into and decide long and intricate questions of rights and titles upon this register ; that there must be some reasonable limit to the extent to which entries on it may be "expunged, vacated or varied," under the power contained in this section, is, in my opinion, clear. For instance, in the case of *Ex parte Green (a)*, I was of opinion, that upon a deed clearly executed for a fraudulent and improper purpose, and while the right in the patent was in another person, I might simply direct the entry to be expunged ; but if a deed be perfectly good and *bonâ fide*, it would be very difficult for me to put an entry on the register, qualifying its effect or giving it a construction ; I do not see that I could, with propriety, do that.

Here a deed, dated the 21st of *February*, 1853, is entered on the register, and all persons may exercise their own judgment as to its effect and construction. This deed, executed by *Morey* to *Johnson*, is a perfectly good and proper deed, and it is impossible, therefore, for me to expunge or vacate the entry of it on the register. The deed of the 13th of *January*, 1851, is also a perfectly good deed ; but it was not entered on the register until the 5th of *August*, 1857. I do not see that I have any power to vary the relative order of those entries ; but I think I have a power to do this : if there were two deeds assigning the patent *simpliciter* to two different persons, and the second was registered before the first, and if it were clearly proved to me that the second deed was executed with full and complete notice of the prior one, though subsequently registered, I should, in my opinion, have power to direct an entry to be made upon the register, to the effect that the second deed, though first registered, was executed by the parties with full and distinct

(a) 24 *Beav.* 145.

distinct knowledge of the deed prior to it in date, but registered subsequently. That would be going a considerable way, but still I am of opinion, that it would be a matter "relating to and affecting the proprietorship in such letters-patent," as to which I should have the power to vary the entry on the register.

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I do not concur in the argument, that it is necessary to have a suit in chancery, for the purpose of establishing the legal rights, in order that they may be established on the register. I think the duty of the Court, in altering the entries on the register, is confined to this:—merely to let the simple facts appear on the register, without putting any legal inference on them, and leaving everybody to draw the proper inferences from those facts.

In the present case, there is no proof of notice beyond that which is contained on the face of the deed of 1853. There is some evidence of a conversation to the same effect as the deed, viz., that a licence had been given to the *Mathers* of *Manchester*. But I have no hesitation in stating, that in my opinion, this was full and complete notice of the instrument by which that licence was given, and, consequently, of the contents of that instrument. That is the legal inference to be drawn from it, but I do not think I can enter a statement to that effect on the register. I am, however, prepared to go to this extent, if that will satisfy the applicant, I am ready to direct that an entry be made on the register, stating the recitals and the operative parts of the deed of 1853 as to the licence to *Mather*, and then saying "The licence referred to in these passages is the deed of assignment of the 13th of *January*, 1851, and the agreement of the 14th of *January*, 1851, which are entered in full on this register on the 5th of *August*, 1857."

Mr.

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Mr. *R. Palmer*. I think I ought to be satisfied with that.

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I think that is as far as I ought to go. I have thought a good deal over this point, and I am satisfied that the duty of the Court, under this section of the act, is, to insert on the register any facts relating to the proprietorship, but not the legal inferences to be drawn from them.

I cannot give any costs.

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June 24.

The directors of a company are trustees, and they have attached to them, for the benefit of the shareholders, all the liability and duties which attach to a trustee and agent. If, therefore, a

THIS cause, which was reported in a former volume (a), now came on for hearing. The facts of the case, so far as are material, are as follows:—

The Defendant *Sir William Magnay* was the chairman of the board of directors and president of the company from *November, 1846, to February, 1855*, when he

(a) 23 *Beav.* 646.

director enter into a contract for the company, he can derive no personal benefit from it.

A railway company furnished a director with a large sum of money, to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it. Held, that the transaction could not stand, but that the company must adopt or repudiate the transaction altogether; and the company having sold the concession pending a suit impeaching the transaction, Held also, that they could have no relief, either as to the application of the money or otherwise.

he resigned ; during that period he took an active part in the management of the affairs of the company.

In the year 1853, the directors seemed to have considered it advisable to obtain the *concession* of another projected line of railway, which had been already granted by the Belgian government, called "*The Grand Junction Railway*," which was, in effect, a series of branch lines, in immediate communication with the *Great Luxembourg Line*, between *Brussels* and *Namur*.

At a meeting of the board of directors, held on the 18th of *November*, 1853, at which *Sir William Magnay* presided, the following resolution was come to, in regard to the *Grand Junction Line* :—

"The president announced his intention of leaving for *Brussels* and *Paris* to-morrow, and it was agreed, that, in order to enable him to lodge the needful caution money, and to take the other measures requisite for the acquisition of the concession of the *Belgian Grand Junction Line*, 5,000 of the guaranteed shares of the company should be written up to 5*l.* paid and delivered to him for that purpose." This minute was subsequently, in *April*, 1854, altered by the secretary, by the direction of *Sir William Magnay*, before signing the fair copy in the minute book, by erasing the word "lodge" and substituting the words "arrange for," and adding the words "pay the engineering expenses" after the words "needful caution money."

The 5,000 guaranteed paid-up shares, of the value of 25,000*l.*, were accordingly handed over to *Sir William Magnay*, who proceeded to *Brussels* to complete his arrangements.

In *December*, 1853, the directors made a report to the shareholders

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shareholders which, as to the acquisition of the *Grand Junction Line*, containing the following passage: —
“ There are other measures, also, no less calculated to exert a beneficial influence upon the prospects of our company, your sanction to which we are about to request. Negotiations, entered into with the *concessionaires* of two Belgian lines, called the *Grand Junction*, warrant the expectation that we shall obtain from them, on equitable and moderate conditions, the transfer of a concession they have obtained from the Belgian government of two lines.” The report then proceeded to shew their value and importance.

The report was submitted to a meeting of shareholders, held in *London* on the 17th *December*, 1853, at which Sir *William Magnay* was president, and the following resolution was passed, namely, “ That the board of directors be authorized to assume the concession of the *Belgian Grand Junction Line*.”

Sir *William Magnay*, in *January* and *February*, 1854, proceeded to take the necessary steps with the Belgian government for the transfer of the concession of the *Grand Junction Lines* to the *Great Luxembourg Company*, and early in *February*, the whole had been consummated, and a legislative decree made, sanctioning the transfer, and formally adopting the *Great Luxembourg Company* as the *concessionaires*, and a part (500,000 francs, or 20,000*l.*) of the *Great Luxembourg Company's* caution money, then in the hands of the government, was transferred by the Belgian government, at Sir *William Magnay's* instance, to a new account, as the caution money in respect of the *Grand Junction Lines*. This Sir *William Magnay* did without the requisite power of attorney. He also realized the 5,000 shares and applied the produce as he thought

thought fit. The shareholders of the *Great Luxembourg Company* had no information or knowledge, either that Sir *William Magnay* had anything personally to do with the *Grand Junction* concession, or that he was to be paid anything for the purchase of it, or as to the terms on which it was to be transferred. But it afterwards appeared, that he was a *concessionaire* of the *Grand Junction Line*, and that the whole benefit of the *concession* of it by the Belgian government belonged to him alone, and that he had applied the funds to his own use.

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Frequent applications were made to Sir *William Magnay* on behalf of the *Great Luxembourg Company*, for an account of his application of the 5,000 shares and their produce, but without success; and on the 23rd of *April*, 1856, the company filed the present bill against him. It alleged that the *Grand Junction Lines* were of no value to the Plaintiffs; that the company had been kept in ignorance of the Defendant's connexion with the *Grand Junction Lines*, and that he had imposed on them the burden of his liabilities and risk respecting it. The bill alleged, that Sir *William Magnay*, although in the position of director, chairman and president of the *Great Luxembourg Company*, suppressed the nature of his connexion with the *Grand Junction Lines*, and many other matters with reference thereto, which it was material for the Plaintiffs and the shareholders to be informed of, and that he made statements with reference to the lines, in the reports and otherwise, for which there was no foundation in point of fact, and by these means, and by suppressing all mention of his own futile attempts to form a company for making the said *Grand Junction Lines*, he placed the Plaintiffs under liabilities, in respect of the caution money and otherwise, which they never would have assumed had they

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they not been deceived, and which the Defendant would not have escaped, had he made a full and fair statement and disclosure in respect of the matters aforesaid, and by these means also and the acts aforesaid, he obtained possession of the said shares and the proceeds thereof.

That the position of Sir *William*, as director, chairman and president, was such, that he could not contract with the Plaintiffs for any benefit for himself [and he has represented that he never contracted or intended to contract for any benefit for himself, and under the circumstances aforesaid, he was neither more nor less than a trustee and agent for Plaintiffs, bound to do the best he could for them, and accountable for whatever he did, either in respect of the shares or caution money or otherwise (a)].

The bill contained the following passage:—"The Plaintiffs were and are ready to [deal with the said *Grand Junction Lines* as the Belgian government may consent to]," but, by amendment, the passage between brackets was struck out and the words "make all just allowances to the Defendant" were substituted.

The bill prayed an account against the Defendant of the 5,000 shares and the proceeds thereof, and of his application thereof, and that he might "indemnify the Plaintiffs in respect of the matters aforesaid, and do all such acts as are necessary for that purpose, the Plaintiffs being ready and willing and hereby offering to make all just and proper allowances, [and do all that ought to be done on their parts in the premises,]"
and

(a) *Amendment.*

and that he might pay the Plaintiffs what might be found due to them.

By amendment, the passage of the prayer between brackets was struck out.

The Defendant denied all liability to account for the 5,000 shares; he said that the directors and shareholders had notice that he was the *cessionnaire* of the *Grand Junction Lines*, and insisted that the 5,000 shares had been handed over to him, as the consideration for the purchase from him, by the Plaintiffs, of his interest in the concession of the *Grand Junction Lines*, and to be distributed amongst himself and friends.

Pending the suit and on the 26th of *October*, 1856, the Plaintiffs (*The Great Luxembourg Company*) entered into an arrangement, by which they sold the *Grand Junction Lines* to a Mr. *Grangier*, who agreed to exonerate them from all their obligations towards the Belgian government respecting it, and to pay to them 500,000 francs, which had been deposited as caution money, and also the sum of 625,000 francs claimed by the company, and originating in the demands against Sir *William Magnay* for the securities appropriated to himself. The 8th article of the agreement was as follows :—" Art. 8. Until the complete reimbursement of the sum of 625,000 francs, the *Great Luxembourg Company* will retain all their rights against Sir *William Magnay* in respect to this sum. The continuation of the proceedings will nevertheless take place at the expense, risk and peril of Mr. *Grangier*. On the other hand, the sums which the company may recover from Sir *William Magnay* shall be deducted from the sum of 625,000 francs which Mr. *Grangier* has bound himself to pay, or else shall be credited to Mr. *Grangier*, with-

out,

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out, however, Mr. *Grangier* being able, in any case, to refuse or delay the payment of the whole or of part of the said sum of 625,000 francs, under the pretext that the company has recovered or may recover any sum whatever on account of their claim against Sir *William Magnay*."

After this sale, the bill was amended on the 19th of June, 1857, as to the matters before referred to.

Mr. *Follett* and Mr. *Giffard* for the Plaintiffs.

Mr. *R. Palmer* and Mr. *Hardy* for the Defendants.

The MASTER of the ROLLS.

I am of opinion that the Plaintiffs are not entitled to any relief in this case, and solely by reason of the contract entered into in the progress of the suit with Mr. *Grangier*.

I have, upon various occasions, stated, what I consider to be the duties and functions of a director of a joint-stock company. He is, in point of fact, not merely a director, but he also fills the character of a trustee for the shareholders, and he is, in regard to all matters entered into on their behalf, to be treated as an agent; therefore there attach to a director, for the benefit of the shareholders, all the liabilities and duties which attach to a trustee and agent. Accordingly, if a director enters into a contract for the company, he cannot personally derive any benefit from it. I will presently point out what I mean by the word "benefit," and this the rather, because it has been argued before me, that the only way of depriving the Defendant of any benefit, in the sense in which the Court uses that word or term,

would

would be simply to make him account for 25,000*l.* or for 5,000 shares. But it is sufficient here to state, that all benefit arising from such a transaction must belong to the shareholders. I accordingly held, in the case of *The Midland Railway Company v. Hudson* (a), that the Defendant, as director and trustee, was bound to give to the company the benefit of a large contract, entered into by him for iron, which had been used on the railroad, and to render to them the pecuniary advantage which he had derived from it. In fact, there is no mode by which any species of sale or dealing between the company and one of its directors can be made valid and effectual, except by bringing the circumstances attending it fully before a general meeting of the shareholders and first obtaining their sanction to the transaction.

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I am, therefore, clearly of opinion, that what occurred in this case, as shown by the resolution of the 18th of *November*, 1853, whether in its original or in its altered form, whether it be regarded as an employment of the Defendant by the company as their agent to negotiate and obtain for them the advantage of a certain concession of the *Belgian Grand Junction Line*, or whether it be regarded in the light of a sale and purchase, cannot be held valid and subsisting, unless the company wish so to hold it. In all such matters, the company have a right to insist on that which is most for their benefit; they may either adopt the transaction or they may repudiate it, but if they elect to do the latter, they must repudiate it altogether.

The general meeting, held on the 16th of *February*, 1853, seems, very properly, to have considered that they were entitled to inquire very carefully into the matter before they exercised their election either to
 adopt

(a) *Not reported on this point.*

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adopt the transaction or to repudiate it. But this is to be observed, that the company cannot repudiate it as to one part and adopt it as to another; that is, they cannot repudiate the transaction so far as it is onerous to themselves, and adopt it so far as it is beneficial; they must deal with the whole, either by rejecting or adopting it *in toto*. Accordingly, the Plaintiffs did, by the bill, offer to deal with the property in such a manner as the Court should direct.

So regarding it, the first question is, what would have been the rights of the parties if no contract had been entered into with Mr. *Grangier*. The Plaintiffs, in the first place, have attempted to establish this proposition:—that upon the true construction of the original agreement, it might be treated by them as a contract for the sale of this concession for 5,000 paid-up shares, and that they might have been at liberty so to adopt it. Now if it were possible for them to have adopted that construction, (upon which I express no opinion,) they ought to have framed their bill on the principle of adopting the contract of sale. But it is clear, that this bill is framed upon the assumption that the whole thing was to be set aside, and that the Defendant was bound to account for the whole of the money he had received in respect of these shares. It was the duty of the Plaintiffs, before they filed their bill, to have made the proper inquiries, and to have made up their minds whether they would adopt the transaction or reject it altogether. I am of opinion that they had the right to exercise that option, that they have done so, and have repudiated the transaction altogether.

That being so, it remains for me to consider, what relief the Plaintiffs were entitled to when the bill was filed.
With

With that view, I proceed to explain what I mean by the proposition, that an agent or a trustee cannot retain any benefit for himself from such a transaction. If, as in the case of the *North Midland Railway Company v. Hudson* (a), a director of a railway company enter into a contract for the purchase of a large quantity of iron in the shape of rails, but before it is wanted, and before it has been actually delivered, (for it took some time in that case to perform the contract with the iron master,) the price of iron should happen to rise, the trustee is not at liberty to put into his pocket the difference between the market price of the iron when delivered and that at which it was purchased. He cannot, in fact, sell it again to the company as if it were his own property. The whole benefit must go to the shareholders and not to the director. But suppose an iron smelting company were desirous of buying an adjoining estate which contained limestone rock, which was essential to enable them to smelt their iron with success, and that the trustee undertook to buy it for them, concealing the fact that it was his own estate, and if he then sell it to the company of which he is a director for double its value, the Court would not allow the transaction to stand. It would say to the company "You may either repudiate the bargain altogether or you may adopt it if you think fit," but if, from any circumstance whatsoever, it becomes impossible to return the estate, all that the trustee would be entitled to would be the full value of the estate sold: but when it is said that he cannot make any profit by the transaction, it is not meant that he is not to have the proper value of the property which is actually taken and adopted by the company; nor does it mean that he is to give up his

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his own property to the company, although he has given no valuable consideration for it. He may have acquired it by gift, by devise or by descent, and though he never paid any money for the property, still he is, in all these cases, equally entitled to the beneficial interest, and to be paid for the property if it be taken away.

What on this principle would have been the right of the parties if this contract had not been entered into with Mr. *Grangier*? Sir *William Magnay* would have been bound to account for the produce of these 5,000 shares, and for the money he received for them and to have paid the amount to the company. But, in return, the company must have restored to him that *concession* which he had transferred to them: it was a valuable property, but whether valuable or not, they obtained it from him and must have restored it.

The principle upon which this Court acts is, to place the parties in exactly the same situation as they were before the transaction. But this case is peculiar, and is varied from the ordinary case by this circumstance,—that this *concession* or right to make a railway, having been conceded by a foreign government to Sir *William Magnay*, and having been transferred by him to the Plaintiffs, cannot be re-transferred to the Defendant, unless with the assent and concurrence of the Belgian government. The Plaintiffs, therefore, might say, that from a cause not arising from any act of their own, it so happens, that a re-transfer cannot be made to the Defendant, for the Belgian government would not permit it, and that the Plaintiffs are not to be made responsible for a difficulty, which arises from the act of the Belgian government. Then what is the consequence that follows from this? why, that in their hands the
concession

concession must be made available for the benefit of the Defendant, in such a manner that the greatest value may be derived from it; and which they must endeavour to obtain. In the first place, it was their duty to prevent any deterioration of it while in their possession, and they must transfer it to such new *concessionaire* as the Belgian government would permit, for the best price that could be obtained for it, and all these advantages are to be paid to the Defendant in return for his accounting for the 5,000 shares.

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I entertain no doubt whatever, that but for this transaction with Mr. *Grangier*, this is the relief I should have held the Plaintiffs entitled to:—I should have directed an account of the money, making all just allowances, and then I should have directed that the *concession* of the *Grand Junction Line* should be made available for the benefit of Sir *William Magnay*. But what is it that the Plaintiffs now ask? In the progress of the suit they actually sell this *concession* to a Mr. *Grangier*, who enters into a contract by which he agrees to repay the caution money to the *Luxembourg Railway Company*, and also to pay them 25,000*l.* for the *concession* transferred. They do this in absolute and unqualified terms, though with a stipulation in it, that if it should so happen that the Plaintiffs should recover anything in this suit from Sir *William Magnay*, it shall be deducted from the amount of the purchase-money payable by Mr. *Grangier*.

Mr. *Follett* felt the force of the difficulty which struck my mind as soon as it was mentioned, and he was only able to suggest that this was a mere contract to indemnify. But to indemnify whom? Either the Plaintiffs or Mr. *Grangier*. But how does that affect the Defendant? The Defendant is called upon to re-

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pay the 25,000*l.* which he has derived from the 5,000 shares; what is he to have in return? The *concession*, for which the 25,000*l.* was given, has been disposed of to another person for the same price, and the whole thing is gone and disposed of. It is impossible that this Court could seriously entertain a proposition that the Defendant is to repay 25,000*l.* to the Plaintiffs, without having restored to him a particle of that which was the consideration for it. Although he is legally liable to account to the company, they have, in the progress of the suit, made it impossible for them to restore the *concession* to the Defendant, upon which condition alone the Court would require him to account for the money he has received. They have taken the estate from him and sold it to another person, and then they ask him to repay them the purchase-money which they have given for it: in other words, they repudiate the contract, as far as they are to pay for it, but they adopt it as far as they are to get anything by it. It is obvious that this cannot be allowed. If it had taken place before the bill was filed, and it had been stated upon the face of it, I entertain no doubt that the Defendant would have demurred to the bill, thus itself shewing that the relief sought could not be obtained.

The result is, that no relief can be given to the Plaintiffs, because they have rendered it impossible. The bill must, therefore, be dismissed, but without costs, because this suit has arisen from the conduct of the Defendant, who does not appear to have been aware how strict are the rules and duties imposed on directors in dealings by them with or for and on behalf of their company.

Such being the state of the case, as I think the bill was right at the time it was filed, and that it was the conduct

conduct of the Defendant which rendered it necessary, but the Plaintiffs having, in the course of the suit, made it impossible for them to obtain any relief, the bill must be dismissed, but without costs.

NOTE.—An appeal was intended, but was rendered nugatory by the insolvency of the Defendant.

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# DUFAUR v. THE PROFESSIONAL LIFE ASSURANCE COMPANY.

July 9.

BY a policy, dated the 3rd of *March*, 1851, *James Laird*, an assistant surgeon in the royal navy, effected an assurance on his own life, with the above assurance company for the sum of 300*l*. The policy contained a proviso in the words following:—"Provided always and these presents are upon the express condition, that in case the said assured, during the continuance of this assurance, shall go beyond the limits of *Europe*, or die on the high seas, (except in time of peace in passing and repassing by land or sea in decked or steam vessels from one part of *Europe* to another, or to or from *Canada*, *Nova Scotia*, *New Brunswick*, *Australasia*, *Bermuda*, *Madeira*, *Cape of Good Hope*, or *Prince Edward's Island*, or to or from any port or ports of *Great Britain* inclusive,) or, being or becoming a military or naval man, shall enter into actual service without the licence of the board of directors previously obtained

A life policy was to become void, if the assured should "commit suicide." After assigning it, he hung himself, while of unsound mind. Held, that the policy was not avoided as against the assignee.

A policy was to become void in certain cases, except it "should have been legally assigned." Held, that this meant "validly and effectually assigned:"—that an equitable charge, by

mere deposit, came within the exception, and that notice of it to the office was unnecessary.



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obtained, or *shall commit suicide*, or die by duelling, or the hands of justice, when the policy or policies shall be cancelled by the return of the premiums, except the policy shall have been *legally assigned*, this policy shall be void, and all monies paid in respect thereof shall be forfeited to the said company."

On the 2nd of *April*, 1853, *James Laird* being indebted to the Plaintiff, his navy agent, in a considerable sum of money on the balance of his account, and being about to quit *England* for foreign service, deposited the policy with the Plaintiff, as security for all moneys then due, and which might, at any time thereafter, become due to the Plaintiff from *James Laird*, on the balance of the account between them. No assignment was ever executed of the policy, and no notice was given the office of this deposit, but the Plaintiff retained possession of it and paid the premiums.

*James Laird* destroyed himself on the 20th of *January*, 1857, and by the coroner's inquest, taken two days afterwards, the jury, who were then sworn to inquire by what means *James Laird* came to his death, found "That *James Laird*, not being of sound mind, memory and understanding, but lunatic and distracted," at the place and time, and by the means and in manner therein mentioned, "did hang, strangle and suffocate himself, of which said hanging, strangling and suffocation he then and there died."

There was due to the Plaintiff from *James Laird*, at his death, 172*l.* 8*s.* 7*d.* The Plaintiff took out letters of administration to the deceased, and applied to the Assurance Company for payment of the amount of the policy; but the board of directors resisted payment, stating that they were advised, that "Mr. *Laird* committed

mitted suicide, and that the only sum payable in consequence of the death was the amount of premiums received on the policy, which the company were prepared to repay, on the usual proof of death and the due surrender of the policy." They also stated, "that the company not having received notice of any assignment or equitable deposit, in the lifetime of the deceased, that transaction could not be, in any way, recognized."

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The Plaintiff instituted this suit against the assurance company, praying an account of what was due to him on his security, and for payment of it by the company.

Mr. *R. Palmer* and Mr. *J. S. Godfrey*, for the Plaintiff, argued, first, that according to the authorities, the assured had not committed suicide, he having been insane at the time he hung himself; *Dormay v. Borrodaile* (a); *Borrodaile v. Hunter* (b); *Clift v. Schwabe* (c).


Secondly, that the policy had been *legally assigned*, within the meaning of that instrument, for, as a policy was not assignable at law, the words "legally" could only mean "lawfully," or *bonâ fide*, and that in such case, it was not to become void. That the meaning of the condition was, that the assured should have the power of assigning the policy so effectually, that a person advancing money upon it should retain his security unimpaired, notwithstanding the assured might commit suicide. That any dealing between the assured and another party, which would constitute that party an assignee of the policy, would entitle him to the full benefit of it; *Cook v. Black* (d). That if there had been

(a) 10 *Beav.* 335.

(b) 5 *Man. & G.* 639.

(c) 3 *Com. B. Rep.* 437.

(d) 1 *Hare*, 393.

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been no such stipulation as this in favor of the assignee, the policy payable on the commission of suicide would have been void; *The Amicable Society v. Bolland* (a); and that these words merely gave notice of what was the effect of the law in such a case.

Thirdly, that the notice to the office of the equitable charge was not necessary to make it effectual as between the assignor and assignee; for that was unnecessary even in the case of a voluntary assignment of a policy; *Fortescue v. Barnett* (b).

Lastly, the instrument is to be construed most strongly against the grantors.

[*The MASTER of the ROLLS.* I think that after the decisions in the cases which have been cited, it will not be necessary to hear the Defendants upon the principal point; but I will hear them upon the question as to the "legal assignment" of the policy.

I cannot distinguish this from *Clift v. Schwabe*, where it was held, in the Exchequer Chamber, that the moral condition of mind was not material in such cases. I think it is also quite clear that the words "commit suicide" are not distinguishable from "perish by his own hand."]

Mr. *W. W. Cooper*, for the company, then argued that the policy had not been "legally assigned," for it had been merely handed over to the Plaintiff; that the condition required, at least, an assignment evidenced by  
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(a) 4 Bli. (N. S.) 194; 2 Dow & Clark, 1. (b) 3 Myl. & K. 38.

some legal instrument in writing. Secondly, that notice to the office was necessary in order to complete the equitable transfer of a chose in action not assignable at law; *Gibson v. Overbury (a)*.

*The MASTER of the ROLLS.*

I think it clear, that the construction suggested by the Plaintiff of the proviso in this policy is the correct one. It has been scarcely disputed, and the company itself seems to have acted upon the same construction when it offered to return the premiums, for it is clear that the words "legally assigned" apply to the point before me as much as to the case of the return of premiums. The only question is, whether the policy has been "legally assigned?" That depends upon the meaning of the word "legal." These words must be taken most strongly against the company, who inserted them for its protection. A policy cannot, at law, be assigned to anybody but the crown, and it is therefore quite clear, that the word "legal" cannot have been used in a technical sense as opposed to the word "equitable." Any one not a lawyer would be shocked at the word "legal" being confined to the sense as distinguished from the word "equitable." With reference to the ordinary dealings of mankind, the word "legal" means "lawful," that is, something effectual and proper and which the Courts of judicature of the country will recognize and enforce. In this Court, however, a technical meaning is attached to the word "legal," it marks the distinction between a legal and an equitable estate and between a legal and equitable right, and these words "legal" and "equitable" are used as opposed to each other. But in ordinary parlance, the meaning of

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PROFESSIONAL  
LIFE  
ASSURANCE  
COMPANY.

(a) 7 *Mec. & W.* 555.



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~  
DUFAYUR  
v.  
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PROFESSIONAL  
LIFE  
ASSURANCE  
COMPANY.

of the word "legal" is not so confined, and I am satisfied that those who prepared this policy used the word "legal" in its popular sense. In any other view the word would have been merely inoperative, because a policy cannot be assigned at law. The words "legally assigned" must therefore mean "validly and effectually assigned."

Then, has it been validly and effectually assigned? That is a question of evidence, and the fact might have been disputed by the company. But they do not dispute the fact, and it is distinctly sworn by the Plaintiff that the policy was deposited with him to secure an advance made by him for the benefit of the assured.

The only remaining question is, what is due to the Plaintiff from the assured. That must be ascertained, if necessary, and, provided it do not exceed the amount of the policy, must be paid by the Defendants with costs. The Plaintiff, by his bill, does not seek to recover more than is due to him under the equitable assignment.

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1858.

THE PRINCE OF WALES, &c. ASSOCIATION  
COMPANY v. PALMER.

ON the 31st of *January*, 1855, after applications to other offices, a policy was effected with the above company on the life of *Walter Palmer* for 13,000*l.*; and the application was apparently made by him. His age was thirty-two, he was personally examined, but from circumstances stated to the office, as to his health and habits, the ordinary premium was considerably increased, and 710*l.* 13*s.* 4*d.* was paid for the first premium.

*Walter Palmer* died on the 16th of *August*, 1855, under suspicious circumstances. His brother *William Palmer* set up a claim to the amount of the policy, under an assignment made to him on the 13th of *February*, 1855, by *Walter Palmer*, nominally in discharge of a debt of 400*l.* But an inquest having been held on the body of *Walter Palmer*, the jury, on the 21st of *December*, 1855, found, that *William Palmer* did, feloniously, wilfully and of and by malice aforethought, kill and murder *Walter Palmer*.

*William Palmer* was afterwards convicted of the murder of *John Parsons Cook*, and hanged, but he was never tried for the alleged murder of his brother *Walter*.

This suit was instituted by the above company to have it declared that the policy had been fraudulently obtained, and that it was void and might be cancelled. It alleged that *William Palmer* had no insurable interest

*June 25.*

A person cannot be appointed to represent an estate under the 15 & 16 *Vict.* c. 86, s. 44, without his consent.

The finding of a jury or a coroner's inquest held to throw the burthen of proof in a civil case on the party alleging the contrary.

Life policy obtained for fraudulent purposes declared void, and the premium already paid to the insurance office applied in payment of the costs.

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terest in his brother's life, and that he had afterwards murdered him. *Walter Palmer* was alleged and proved to be a man of very intemperate habits, and to have been several times attacked with *delirium tremens*; but it also appeared that the fact of his having been once so attacked had been called to the attention of the insurance office, who had in consequence required an additional premium by adding twenty years to his age.

There being no legal personal representative of *Walter Palmer*, his widow was originally made a Defendant, but she disclaimed all interest. The Court afterwards appointed her to represent her husband's estate (under the 15th & 16th *Vict.* c. 86, s. 44) but she declined the office, and the Court then held, that it would not impose on an unwilling party that duty. She was dismissed and *George Palmer* was appointed, with his assent, to represent *Walter Palmer's* estate and was made a Defendant.

A solicitor named *Pratt*, who had been engaged in the negotiation for effecting the policies, had also originally been made a party, as being interested in the policy; but he also disclaimed and was dismissed. He afterwards attended at the Record and Writ Clerks' Office to make an affidavit on the matter, but the oath being tendered to him, he went raving mad and so continued.

The cause now came on for hearing against *George Palmer* and the *Attorney-General* as representing the Crown.

Mr. *R. Palmer* and Mr. *G. Hastings* for the Plaintiffs.

Mr.

Mr. *Wickens*, for the Crown, disclaimed.

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[*The MASTER of the ROLLS.* I think there was notice to the insurance company to put them on inquiry as to the habits of *Walter Palmer*; but I am disposed to think, upon the evidence, that they may have been justified in taking the risk, and that if *Walter Palmer* had reformed his habits they might have found the policy not a bad one; however, I have not the means of trying that question. But upon the rest of the evidence, I think that all that can be done by the Defendant is to submit any observations on the evidence which require my attention to be called to it. I have already attended carefully to it, and I think it establishes that this was *William Palmer's* policy, effected by him as part of a scheme to get large sums of money from various insurance offices. I also think that the burthen of proof would lie on *William Palmer*, or his executor, to shew that the jury did not come to a correct conclusion in the verdict they gave.]

Mr. *Selwyn* and Mr. *W. H. Clarke* were then heard for the Defendant.

*The MASTER of the ROLLS.*

I think that *Walter Palmer* never had any interest in the policy. I also think that it is established that *William Palmer* laid a deliberate plan for defrauding various insurance offices, and among others the Plaintiffs'. The mode of accomplishing it was by effecting insurances upon the lives of persons who were, in a great measure, under his control, and then by precipitating, by his own act, the period at which those in-

surances

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surances were to become claims on the insurance offices. The jury, on the coroner's inquest, have come to that deliberate opinion, and the present evidence all tends that way. I think that the burthen of proof would lie on any person claiming adversely to the Plaintiffs to establish the contrary; but no evidence has been brought forward to establish it, and none seems possible.

I am of opinion, therefore, that the company is entitled to have the policy delivered up to be cancelled, and to have a declaration that it was obtained by fraudulent means or for fraudulent purposes, and that nothing is due upon it.

As to the 710*l.* paid them for the premium, that must be applied in payment of the costs of all parties, and the residue paid into Court, with liberty to apply. The Defendants must have their costs, because it was impossible, in my opinion, for the Plaintiffs to have succeeded without bringing them here.

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1858.

## MOLLETT v. ENEQUIST.

July 7.

**I**N *November*, 1857, a steam ship called the *Eagle* struck on a reef off the island of *Gottland* in her voyage from *Cronstadt* to *Hull*. She had on board a quantity of gold belonging to the Plaintiffs, which was saved. The Defendant *Enequist*, the British consul in *Gottland*, incurred considerable expenses in the matter, and, as he alleged, paid to *Thomson* for salvage a sum of 4,000*l.* due to him under an agreement entered into between the captain of the ship and *Thomson*, by which the former agreed to pay the latter one-tenth of the gold for its salvage, &c.

To entitle a Plaintiff to an injunction to restrain proceedings at law, he must himself verify the allegations in his bill, and shew, by affidavit, that the discovery required is material.

This bill insisted that such salvage was excessive and unreasonable, and that it had not been paid, and if it had been, then that it had been paid voluntarily and collusively by the Defendant. It sought to set aside the agreement, offering to pay all reasonable charges, and for an injunction to restrain any proceedings at law which might be brought by *Enequist*.

The Defendant put in a long answer on the 20th of *May*, 1858, denying these imputations, but some exceptions having been taken to the answer for insufficiency, they were allowed on the 28th of *June*, 1858.

A motion was now made for an injunction to restrain all proceedings in an action at law, which had been brought against the Plaintiffs by *Enequist* to recover the amount of his claims.

Mr.

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 v.  
 ENEQUIST.

Mr. *Druce*, in support of the motion, argued, that the Plaintiffs were entitled to a complete discovery and therefore a full answer to their bill, before being compelled to go to trial at law, and that such was now the established practice of the Court; *Senior v. Pritchard* (a); *Lovell v. Galloway* (b).

Mr. *Selwyn* and Mr. *Piggott* for the Defendant. The application is only for delay, and there is no affidavit of merits made by the Plaintiffs or that the discovery is necessary for the trial. The principles laid down in the cases of *Lovell v. Galloway* and *Senior v. Pritchard* have been greatly modified by the Lord Justices in *Fox v. Hill* (c). According to the old practice, an affidavit of the Plaintiff and his solicitor was always required to extend an injunction to stay trial, and the practice has not, in this respect, been altered by the 15 & 16 *Vict.* c. 86, s. 58.

[*The MASTER of the ROLLS* said he thought that the Defendant was entitled to an affidavit that the discovery was necessary, and to an affidavit of the Plaintiffs on the merits; but he would hear a reply on these points.]

Mr. *Druce*, in reply. The Plaintiffs are entitled to have the Defendant's answer before they proceed to trial. There is an affidavit of the solicitor, but the Plaintiffs cannot make an affidavit of the merits, they having no personal knowledge of the facts. If, therefore, these be requisites according to the present practice, they have been, as far as possible, complied with.

*The*

(a) 16 *Beav.* 473.  
 (b) 17 *Beav.* 1.

(c) 2 *De Gex & Jones*, 353.

*The MASTER of the ROLLS.*

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I do not think I can make the order asked. I think that the Plaintiffs are entitled to an answer, but that, to stay the proceedings at law, the answer must be shewn to be material to the trial of the action.

In respect of the merits of the case, I am also of opinion, that there must be an affidavit that the facts stated in bill, so far as they are within the knowledge of Plaintiffs, are true, and as to all other facts, that the Plaintiffs believe them to be true. The Plaintiffs have not made such an affidavit, and I cannot grant the motion.

The Defendant's costs must either be reserved or made costs in the cause.

Mr. *Druce* asked that the motion might stand over, but

*The MASTER of the ROLLS* refused to allow it.



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*In re* WELSTEAD.

July 7.

A testator bequeathed 1,500*l.* towards adding to the endowment of a church. By a codicil, he declared, that in consideration of it, his nephew and his heirs should have every third nomination of the clergyman. The bishop (who was the patron) refused to relinquish the patronage. Held, that the gift failed, and that the 1,500*l.* fell into the residue.

THE testator, by his will, directed "That the sum of 1,500*l.* might be applied in adding to the endowment of the new church at *Turnham Green*, in the parish of *Chiswick*, in such manner as the Bishop or ordinary should approve."

By a codicil, the testator proceeds as follows:—"I hereby also declare my will and desire, that in consideration of the endowment or provision made by my will for the new district church of *Chiswick*, my nephew *Charles M. Welstead*, and his heirs, executors and administrators, shall have the nomination and appointment of one, in three, of the clergymen who may be hereafter appointed to officiate and perform the service thereat."

The testator died in 1850, and soon after his death, the executors gave notice to the late Bishop of *London*, the patron of the district church in right of the See, of the legacy of 1,500*l.*, and the declaration made in the codicil. The late Bishop merely stated, that he saw some difficulty, and nothing further having been done, the executors paid the money into Court, under the Trustee Relief Act.

The residuary legatee, Mr. *Welstead*, now presented a petition for payment of the fund to him and the other residuary legatee. They contended that, inasmuch as the Bishop could not make over the nomination of one in three of the clergymen to officiate at the district church,

church, the legacy of 1,500*l.* failed altogether, and became part of the residuary estate.

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*In re*  
WELSTEAD.

The petition now came on for hearing.

Mr. *R. Palmer* and Mr. *Foster*, in support of the petition, argued that the gift was on condition, which not being complied with, the legacy failed and became part of the residue.

Mr. *Wickens* for the *Attorney-General*. It is not a condition at all, but if it be, it is a condition subsequent, which has become impossible, and the first gift, therefore, for the increase of the endowment of the district church, remains absolute.

Mr. *Kent* said the Bishop of *London* was of opinion that it was not for the interest of the See that he should part with the nomination. He stated that the Bishop had power, with consent, to do what was required, but he asked for time to consider whether he would or not relinquish the patronage.

*The MASTER of the ROLLS.*

I think this codicil is connected with the gift contained in the will, and that I must read it in this way:—  
“ I give 1,500*l.* as an additional endowment to the district church ; but I declare that, in consideration of it, my nephew and his heirs shall have every third nomination of the officiating clergyman.”

So reading it, I think that the bequest is for the purchase of this right of nomination, and that it cannot properly be treated as a condition either precedent or subsequent. The testator intended to purchase the  
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nomination,

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In re
WELSTEAD.

nomination, but if that cannot be accomplished, it will fail.

Let the petition stand over for the Bishop to exercise his option, whether he will relinquish the nomination for himself and his successors.

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The Bishop of *London* having elected not to relinquish the patronage of the district church,

The MASTER of the ROLLS directed the costs of all parties to be paid out of the fund, and the residue to be paid over to the residuary legatees.

See Cherry v. Mott, 1 Myl. & Craig, 123.

FURNESS *v.* THE CATERHAM RAILWAY COMPANY.

July 8, 22.

A judgment creditor and debenture holder of a railway company held neither entitled to a foreclosure or sale. But inquiries were directed.

UNDER the *Caterham* Railway Act, 1854 (*a*), the above company was incorporated, and was thereby authorized to make a railroad from *Godstone* to *Caterham*, and to borrow a limited sum "on mortgage or bond." The Companies Clauses, the Lands Clauses, and the Railway Clauses Consolidations Acts (1845) were incorporated in it.

The railway was constructed for the company by the Plaintiff, who received debentures for 8,000*l.*, whereby the

(*a*) 17 & 18 *Vict. c. lxviii.*

the company assigned "the said undertaking and all the tolls and sums of money arising by virtue of the said act, and all estate, right and interest of the company in the same," to hold until repayment of the amount and interest (a).

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 COMPANY.

In *April*, 1857, the Plaintiff obtained judgment against the company for 3,934*l.* the balance of his debt, which was duly registered. He issued a writ of *fi. fa.* against the goods and chattels of the railway company, which was ineffectual. He afterwards issued a writ of *elegit* under the judgment, and had, by virtue of such writ, been put into possession of the railway and tolls. The Plaintiff had also given the proper notice for payment of the debentures; but notwithstanding all the Plaintiff's efforts, the 8,000*l.* and interest on the debentures, and 3,821*l.* on the judgment still remained unpaid. The Plaintiff instituted this suit against the *Caterham Company*, and also against four registered judgment creditors of that company and the *Brighton Railway Company*, praying a declaration—1, That by virtue of his judgment, the Plaintiff was entitled to a charge on the lands of the railway company; 2, For an account of what was due to the Plaintiff; 3, And the other incumbrances; and 4, "That the lands of the company might be sold, under the direction of the Court, in such manner and subject to such conditions as the Court should think fit, and that the proceeds of such sale might be applied in payment of what should be found due to the Plaintiff, and the other incumbrancers, according to their priorities; or otherwise, that the judgment and debentures and other incumbrances, according to their priorities, might be satisfied out

(a) See 8 & 9 *Vict. c. 16, ss. 38—55, and Schedule (C).*

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 COMPANY.

out of the property of the company, in such manner as the Court should think proper."

The only property which the *Caterham Railway Company* had, consisted of the land on which the railway had been constructed, with the line of rails, buildings and offices laid and erected thereon for the purposes of the railway. The railway was, at present, worked with a steam engine and carriages of the *South-Eastern Railway Company*, under a contract which would expire on the 31st of *July*, 1858. The tolls, after deducting the expenses, amounted only to about ten guineas a month.

The cause now came on upon a motion for a decree.

Mr. *Lloyd* and Mr. *Smythe* for the Plaintiff, argued, that the judgment operated as an equitable mortgage under the 1 & 2 *Vict.* c. 110, and that the Plaintiff, in respect of his judgment, was entitled to have the property comprised in his mortgage sold for the benefit of himself and the other incumbrancers, although the debentures which assigned the undertaking might not include the land; *Doe* d. *Myatt* v. *The St. Helens Railway Company* (a). They also referred to *Russell* v. *The East Anglian Railway Company* (b); *Hart* v. *The Eastern Union Railway Company* (c); *Hawkins* v. *Gathercole* (d).

Mr. *Erskine*, for vendors of part of the land taken by the railway company, claimed a lien for unpaid purchase-money, and argued, that such lien upon the land taken,

(a) 2 Q. B. Rep. 364.
 (b) 3 Mac. & G. 104.
 (c) 8 Exch. Rep. 116.

(d) 1 Sim. N. S. 63; 6 De
Ger. M. & G. 1.

taken, had priority over all subsequent charges created by the Company.

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COMPANY.

Mr. *W. W. Cooper*, for other judgment creditors, opposed the Plaintiff. He argued that the charge on the "undertaking," as constituted by the debentures, was not a charge on the land.

Mr. *Surridge*, for the *Caterham Railway Company*. The Plaintiff is in possession of the tolls, and the only other property of the company is its interest in the land on which the railway is constructed. There can be neither a decree for sale nor for foreclosure. The Act authorized the construction of the railway principally for the benefit of the public, and in order to form a highway, subject to certain restrictions, which are specified. The company has important public duties to perform in respect of it, and nothing but the express provisions of an Act of Parliament could empower it to sell or lease the railway, or to deprive themselves of their powers or release themselves from their duties. Some of the clauses in their act are imperative; thus, they *shall* erect and maintain stations, &c., &c., and in default, they are liable to a penalty of 20*l.* and a daily penalty of 10*l.* (a). The Board of Trade may, at any time, require the company to erect bridges or arches (b). Besides this, the General Act imposes on them duties to be performed for ever (c). The company is, in some respects, a trustee for the public, and no mortgagee or purchaser can exercise the powers conferred by the legislature exclusively on the company. The charges created by the debentures were intended to have effect only on the limited beneficial ownership of the company on the surplus tolls,

(a) *Sect. 20.*

(b) *Sect. 21.*

(c) *See 8 & 9 Vict. c. 20, s. 68.*

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tolls, and not on the trust estate; and as to the judgments, the 1 & 2 Vict. c. 110, s. 13, cannot apply to the lands of corporations, who have public duties to perform in respect of them (a).

Potts v. The Warwick, &c., Canal Company (b) decides that no decree can be made affecting the right of user of the railroad by the public, and the powers of management by the company.

Mr. R. Palmer, on the same side, afterwards referred to *Exchequer Loans Act*; *Jortin v. The South Eastern Railway Company* (c).

Mr. Hingston, for the *Brighton Railway Company*, also opposed the relief asked by the Plaintiff.

Mr. Lloyd, in reply. As there is a right to redeem, there is an equity of redemption, which the Plaintiff is entitled to foreclose: a decree can, at all events, be made subject to the powers and duties of the company, and to the right of user by the public. *Fripp v. The Chard Railway Company* (d) shews, that the Plaintiff has a right, at least, to a receiver of the tolls, and being now in possession, he is entitled to be relieved from the onerous duty of accounting, as a mortgagee in possession, for what, without his wilful default, he might have received.

The MASTER of the ROLLS, during the argument, pointed out the inconvenience of granting either a sale or foreclosure, whereby the benefit of the line of railway might

(a) See *The Steamers' Company v. The Irish Society*, 7 Bore. 641; 12 Cl. & Fin. 425.

(b) 1 Kay, 142.

(c) 6 De Gez, M. & G. 270.

(d) 11 Bore. 241.

might be lost to the public. He afterwards expressed his opinion, that there could be neither a sale nor foreclosure; but he said, that the Plaintiff might possibly be entitled to be relieved from the burden of accounting as an incumbrancer in possession. That all that he could do, at present, was, to direct inquiries as to what was due to the Plaintiff on his judgments and debentures, what charges there were on the railway or the undertaking, tolls and duties, and what was due on them and their priorities, and what, if anything, was due to the landowners for unpaid purchase-money, in respect of their lien on lands taken by the company; and what lands were subject to such lien.

The costs, he said, must be added by the incumbrancers to their several securities, and further consideration must be reserved, with liberty to apply.

The case came on to be spoken to as to the minutes, when, by arrangement, the Plaintiff was appointed receiver of the tolls, without salary, and an inquiry was also added, whether any and what arrangement could be made, for working the railway after the termination of the present contract.

The MASTER of the ROLLS also said, I think I can direct an inquiry, whether any and what means can be taken, for the purpose of making the railway available for payment to the Plaintiff and the other incumbrancers of the amounts due to them respectively.

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THOMAS v. LLOYD.

A testator gave his wife a power of appointment in favor of "his children, including grandchildren and more remote issue, such issue coming into being in the lifetime of his wife."

Held, that under an appointment to grandchildren, a grandchild born after the decease of the testator's widow might take.

Declaration of rights, as between co-Defendants, refused.

THE testator devised his real estate to trustees and their heirs upon trust to permit his wife to receive the rents during her widowhood, and afterwards upon trust for all or any one or more of his, the testator's, children, including grandchildren and more remote issue, *such issue coming into being in the lifetime of his wife*, for such estates, in such shares, &c. as his wife, during her widowhood, should appoint; and in default, then upon the trusts therein mentioned.

The testator died in 1849, and in 1854, the widow made an appointment in favor of the testator's children and grandchildren. The widow died in 1854, and this suit was instituted to have the trusts of the will performed.

One question was, whether the appointment in favor of the infant Defendant *Frances Jane Lloyd Evans* (a child of *Mary Evans*, a daughter of the testator), born after the decease of the testator's widow, was valid.

Mr. *Lloyd* and Mr. *C. C. Barber* for the Plaintiffs.

Mr. *R. Palmer* and Mr. *Elderton* for *Robert Lloyd*.

Mr. *Eddis*, for the three other children of *Mary Evans* born before the death of the testator's widow, objected, that grandchildren of the testator born after the decease of the testator's widow were excluded from the trust, by the words "such issue coming into being
in

in the lifetime of my wife." He argued that these words applied to all the issue mentioned immediately before, and included grandchildren, and that, therefore, the grandchildren born after the death of the widow were excluded.

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Mr. *Kenyon* for *Frances Jane Lloyd Evans*.

The MASTER of the ROLLS.

The words "such issue coming into being in the lifetime of my wife" relate only to the "more remote issue" mentioned immediately preceding them, and not to the grandchildren.

They were introduced in order to guard against the rule against remoteness, which might have rendered an appointment to issue too remote, but which could not apply to the grandchildren of the testator. I therefore think that grandchildren born after the decease of the testator's widow are not excluded from the trust.

Mr. *Kenyon* asked that a declaration to that effect might be inserted in the decree; but

The MASTER of the ROLLS thought, that as the question was one arising merely between co-Defendants, it would not be proper to insert such a declaration in the decree.

The cause now came on for further consideration, when

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Mr. *Kenyon* again pressed for a declaration; but

The

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The MASTER of the ROLLS held, that the declaration made at the hearing, "that the trusts of the will and of the deed-poll of appointment made thereon by the widow *Jane Lloyd*, deceased, dated the 8th day of *April*, 1854, ought to be performed," rendered any further declaration unnecessary.

DARKE v. WILLIAMSON.

July 7, 8, 26.

The rebuilding of a dissenting chapel was entrusted to three of the several trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the title deeds of the chapel, 500*l.*, which they personally engaged to pay. Interest was, for a long time, paid out of the chapel funds, but ultimately, the representatives of the trustees were compelled to pay the money. The legal estate was

vested in new trustees. Held, that the representatives of the persons who had paid the 500*l.* had a lien on the deeds, but that they were not entitled to a decree for foreclosure or sale, as by granting such relief, the trust would be altogether destroyed.

IN 1723, a Baptist chapel, or meeting-house, was established in *Exeter*, and the property was conveyed to trustees for that purpose.

In 1816 and 1818 further property was purchased in order to enlarge it, which was conveyed by indenture of those dates.

By indenture of the 5th of *December*, 1822, after reciting that the meeting-house was, by length of time, become dilapidated and dangerous, and, in consequence thereof, had then lately been and still continued to be shut up, and that it was the intention of the surviving trustees thereof, and of the society worshipping there, to take down and rebuild the meeting-house, and to enlarge the same, by taking in the site of all the premises included in the indentures of 1816 and 1818, the meeting-house and premises comprised in the indenture of 1723 were duly conveyed to *Culverwell*,

Westlake

Westlake and *Moxey*, and twelve other trustees, upon the trusts of the indenture of 1723. And the properties comprised in the deeds of 1816 and 1818 were conveyed to the same fifteen trustees, upon trust for the society, and that it should be lawful for the society to pull down and demolish the same messuages and premises, and to erect a part of the intended new meeting-house thereon, at such time and whenever the communicants, or the major part of them for the time being, of such society or congregation, then lately assembling for divine worship in the then present meeting-house, should think proper and direct, and that such part of the intended meeting-house as should be erected on the site of the messuages, hereditaments and premises, respectively, should be subject to and governed by the same trusts as were thereby declared concerning the meeting-house, so far as the same could relate thereto.

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And it was declared, that the trustees, "their heirs, executors, administrators and assigns, and all future trustees of the trust premises, their heirs and assigns, should be, for ever, saved, kept harmless, and indemnified, out of the aforesaid premises, of, from and against all costs, losses, damages, charges and expenses whatsoever, which they or any or either of them might bear, pay, sustain or be put unto, for or by reason of their acting in the execution or management of all or any or either of the trusts aforesaid, and in pursuance thereof."

Shortly afterwards, the old meeting-house and the houses on the newly purchased property adjoining thereto were pulled down and demolished, by the direction of the society or congregation, and the management of the rebuilding of the meeting-house and premises was deputed and intrusted, by the society or congregation, to *Culverwell*, *Westlake* and *Moxey*, who
were

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—
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were at that time the deacons of the chapel or meeting-house. They accordingly superintended the rebuilding of the meeting-house and premises, on behalf of the society.

The chapel, &c., were, accordingly, rebuilt, but the costs exceeded the amount in hand; and, in order to pay the builders, *Culverwell*, *Westlake* and *Moxey* borrowed, of *Ann Smith*, a sum of 500*l.* to enable them to pay them. They gave her their promissory note for this sum, and deposited the title deeds of the chapel and premises with her solicitor, as a security for the repayment of the 500*l.* and interest.

Shortly after 1826, *Moxey*, and the representatives of *Culverwell* and of *Westlake*, paid to *Ann Smith* the amount of the promissory note.

The trustees of the chapel, out of the moneys of the society or congregation, paid *Ann Smith* interest on the 500*l.*, and, after she had been paid off, they continued to pay interest to the persons who had paid it off, down to 1853; but the payment of the interest had since been discontinued.

In consequence, this bill was filed by the legal personal representatives of *Westlake*, against the new trustees of the chapel, in whom the property was now vested, and the solicitor in whose hands the deeds were deposited, praying a declaration that the Plaintiff was entitled to a lien or charge, in equity, on the chapel or premises, for the sums paid to *Ann Smith*, and for the usual decree for foreclosure or sale, and for an injunction to restrain the sale of the property, which had been threatened.

Mr.

Mr. *R. Palmer* and Mr. *Fischer* for the Plaintiffs. The trustees had authority to raise the necessary funds to effect the object of the congregation of rebuilding the chapel. An express power to mortgage was not necessary, it will be implied, if it was necessary in order to accomplish the object authorized; *Stroughill v. Anstey* (a); *Devaynes v. Robinson* (b). In this case, the money has been laid out in the improvement of the property, with the sanction of all persons interested, who have encouraged the expenditure, and the mortgage has uniformly been recognized by the payment of interest.

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A trustee has always a right to be indemnified out of the trust property; *In re The German Mining Company* (c); *In re The Norwich Yarn Company* (d); *Worrell v. Harford* (e); *Fooffees of Heriot's Hospital v. Ross* (f); and here there is, besides, an express stipulation that they shall be saved harmless and kept indemnified.

Mr. *Selwyn* and Mr. *W. H. Terrell*, for the Defendants, the trustees, argued, that there was no existing mortgage on the property, and that the trustees had, by the deed of trust, no power to create one. Secondly, that the trustees had no right to have the property sold for the payment of the claims of a mere builder.

The MASTER of the ROLLS reserved judgment.

The

(a) 1 *De Gex, M. & G.* 635.(b) 24 *Beav.* 86.(c) 4 *De Gex, M. & G.* 19.(d) 22 *Beav.* 143.(e) 8 *Ves. jun.* 8.(f) 12 *Clarke & Fin.* 575.

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DARKE

v.

WILLIAMSON.

July 21.

The MASTER of the ROLLS.

In this case, the Plaintiff, Mrs. *Darke*, claims a lien upon a Baptist Chapel at *Exeter*, on account of expenses incurred by her testator in the execution of the trust.

The facts on which the question arises are very simple. In 1725, the chapel was established, and in 1822 it was rebuilt, and the management of the matter was entrusted to the chapel wardens, one of whom was Mr. *Darke*, the testator of the Plaintiff. For this purpose, they borrowed 500*l.* from *Ann Smith*, and they deposited with her solicitor the title deeds of the chapel. They also made themselves personally liable to her for the repayment of the amount thus borrowed.

Subsequently to this, payment of the debt was enforced against the estate of Mr. *Darke*, and the Plaintiff, his representative, now insists that she is entitled to a lien on the chapel to be repaid the amount.

In support of the Plaintiff's case, I have been referred to many authorities, laying down this proposition, that a trustee is entitled to be repaid any expenses properly incurred in the execution of his trust. On the correctness of this proposition there can be no doubt; but the question is, whether a trustee can, for that purpose, destroy all the trusts? No case goes that length. The principle that a trustee shall be allowed all his costs and expenses incurred in the execution of his trust, rests on an implied contract or understanding. If I were to grant what is asked *simpliciter*, and foreclose or sell the chapel, it would destroy the trusts altogether. I must consider the question as if it had arisen immediately after the 500*l.* had been laid out in rebuilding

building the chapel. Could the trustees, immediately thereupon, have applied to this Court, and have had the chapel sold to repay them? I apprehend that this could not have been done; for it would be the complete destruction of the trusts which they had undertaken to perform, and would be a practical contradiction in terms.

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At the same time, I think that the owners of this chapel cannot sell it, without providing for the claims of the Plaintiff, but I find great difficulty in working out the right. I am satisfied that the deeds are properly in the Plaintiff's custody, and that she is entitled to retain them until she is repaid everything that is due to her for principal, interest and costs of this suit. I cannot go beyond that, except to declare this:—That if the trustees of the chapel or property, or the present owners, attempt to sell or dispose of them, the Plaintiff is entitled to have notice thereof, and she is to have liberty to apply to this Court as she may be advised. I am also of opinion, that if they put an end to the trust, then her lien would be enforceable.

The solicitor must deliver up the deeds to the Plaintiff.

1858.



SMITH v. HORSFALL.

June 29.

A testator bequeathed his residue equally to his five cousins who should be living at the time of his decease, and to the "issue" of such of them as should be then dead leaving issue, share and share alike, "such issue, respectively, nevertheless, taking between them a parent's share." Held, that the word "issue" was to be construed "children," and that grandchildren were excluded.

THE testator gave his real and personal estate to trustees for his widow during her widowhood, and on her death or second marriage to sell and convert and stand possessed of the produce, upon trusts which he expressed as follows:—

"As to, for and concerning one moiety or equal half part, upon trust to pay and divide the same unto and equally between and amongst all and every my cousins, the children of my uncle *William Greenwood*, deceased, namely, *John Greenwood*, *Betty Topcliffe*, *Mary Knowles*, *Ann Saville* and *Martha Naylor*, who shall be living at the time of my decease, and to the issue of such of them as shall be then dead leaving lawful issue, share and share alike, such issue respectively, nevertheless, taking between and amongst them a *parent's* share only."

"And as to, for and concerning the other moiety or equal half part of the said trust moneys, upon trust to pay two legacies, and as to "the remainder of the same moiety or half part of the said trust moneys, upon trust to pay and divide the same unto and equally amongst all and every the brothers of my said wife and her nephew *Charles Hick* (the son of her late brother *Thomas Hick*) who shall be living at my decease, and to the issue of such of them as shall be then dead leaving lawful issue, share and share alike, such issue respectively nevertheless taking, between and amongst them, a *parent's* share only."

The

The testator died in 1852, and his wife in 1853.

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It is unnecessary to specify the state of the families of the legatees, as the following instance will suffice to explain the question which arose as to whether "issue" was to be construed "children," or whether it extended to more remote issue, as grandchildren.

The testator's cousin *Betty Topcliffe* died in his lifetime: she left surviving the testator, three children and three grandchildren. These three grandchildren were the children of two of her children who had died in the testator's lifetime, and such three grandchildren were named *Thomas Fernie*, *Joseph Fernie* and *James Naylor Topless*.

The testator's wife had one brother who survived the testator and four who were then dead, leaving issue. *Joseph Hick* was one of the brothers of the testator's wife who died in the testator's life. His issue who survived the testator were a son (*John Atkinson Hick*) and seven grandchildren (children of two deceased children); two of such grandchildren were *Thomas Walter Hick* and *Sarah Ann Smith*.

Mr. *R. Palmer* and Mr. *Rogers* for the Plaintiffs, the children of *John Greenwood*. The "issue" are substituted for the parent, and they are to take "a parent's share only;" consequently, the word "issue" has reference to the parent and is confined to children.

Mr. *Swanston*, jun. for *William Topcliffe*, also argued that "issue" meant "children." He cited *Sibley v. Perry* (a); *Pruen v. Osborne* (b); *Bradshaw v. Mel-ling* (c).

Mr.

(a) 7 Ves. 522.

(b) 11 Sim. 132.

(c) 19 Beav. 417.

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Mr. *Birkbeck* for *Thomas Walter Hick* and *Sarah Ann Smith*, grandchildren of a brother of the testator's wife, and

Mr. *Whiteley* in the same interest, argued that the gifts to the issue extended to the grandchildren. They cited and commented on—*Farrant v. Nichols* (a); *In re Jones' Trust* (b); *Bradshaw v. Melling* (c); *Sibley v. Perry* (d); *Ross v. Ross* (e); *Pruen v. Osborne* (f).

Mr. *Westlake* and Mr. *Bevir* for other parties.

Mr. *Follett* and Mr. *Rendall* for the trustees.

The MASTER of the ROLLS.

The word "parent" applies to the five persons named, and the "issue" of those persons who are to take a parent's share means "their children." That is the only way in which I can construe this will, and the same was held in *Sibley v. Perry* and *Pruen v. Osborne*.

In *Ross v. Ross* (g) a different question arose. In that case, there was a gift to *A.* for life, and afterwards to her *children* living at her decease and the *issue* of such of her children as might have died in her lifetime, the *issue* of such deceased *children* to take equally the part which their *parent* would have been entitled to, and if but one, then to take a child's share. One child died in the life of *A.* leaving no child but one grandchild, and the "question was, whether that great grandchild of *A.* could take a share" as issue. I was of opinion that "issue" was confined to the children of the

(a) 9 *Beav.* 327.
 (b) 23 *Beav.* 242.
 (c) 19 *Beav.* 417.
 (d) 7 *Ves.* 522.

(e) 20 *Beav.* 645.
 (f) 11 *Sim.* 132.
 (g) 20 *Beav.* 645.

the "parent;" but that the parent herself might be a grandchild of A. The question only arose in that way.

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Here it is given direct to the five cousins who should be living at the decease of the testator, and to the issue of such of them as should be then dead, and the issue to take a parent's share only. *Issue* here means *children*, and that is its signification in all such cases where a direct reference is made to the parent of the issue. I entertain no doubt on the point, and I should be unsettling the law if I were to hold the contrary.

The decree, amongst other things, declared that the first moiety was divisible into fifths, and that one-fifth belonged to the three children of *Betty Topcliffe*. That the second moiety was divisible into fifths, and that one-fifth belonged to the representative of *John Atkinson Hick*.

1858.

July 10, 24.

The personal interests of a trustee in a trust fund in Court will be made applicable to the discharge of all claims against him as trustee.

A. B. was entitled to a share of funds held upon the trusts of his father's marriage settlement, and for which his father's estate was liable. He was one of his father's executors. In a suit to administer the trusts of the settlement and his father's estate, a large balance was found due from *A. B.* as executor.

Held, that the trustees of the settlement were entitled to retain such balance out of *A. B.*'s share, and that purchasers from *A. B.*, pending the suit, with notice of the proceedings, were bound by the same equity.

In 1829, *H. de C.* secured an annuity on trust funds, and in 1841, he, for valuable consideration, assigned his interest in the same funds in trust to raise 1,100*l.*, and redeem the annuity, and hold the residue on trusts for his family. The trustees accordingly raised the 1,100*l.* by mortgage and redeemed the annuity, and the trust funds were assigned to the mortgagees, but no transfer was made of the annuity. The mortgage deed stated, that the consideration to have been "for the repurchase and extinction of the annuity." The annuity had originally priority over certain claimants, but the deed of 1841 had not. *Held*, that to the extent of the moneys paid for the repurchase of the annuity, the mortgagees had priority over those claimants.

IRBY v. IRBY. (No. 3.) (a)

THE question in this case was, whether a sum of about 3,658*l.* 1*l.*s., which belonged to *Herbert de Crespigny* under the trusts of his father's marriage settlement, and which was part of a larger sum now in Court, could be retained, on behalf of his father's estate, in part discharge of a sum of 8,937*l.* due from him (*Herbert de Crespigny*) as his father's executor.

The facts were shortly these:—In 1786, on the marriage of Sir *William de Crespigny*, funds, amounting to about 18,519*l.*, were settled in trust for Sir *William* for life, with remainder to the children of the marriage. *Herbert de Crespigny* was one of the eight children of the marriage, and his share, in the events which happened, amounted to 3,658*l.* 1*l.*s.

The

(a) Reported ante, 22 Beav. 217 and 24 Beav. 525.

DATES.

1796 . . . Settlement.	1832 . . . Decree.
1829, Feb. Annuity granted.	1841, July. Separation deed.
Dec. Death of Sir W.	Dec. Mortgage for 1,100 <i>l.</i>
1830 . . . Bill filed.	1857 . . . Second Decree.

The trustees of the settlement, in violation of their duty, lent 15,500*l.* to Sir *William de Crespigny*.

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IRBY.
(No. 3.)

Sir *William* died in *December*, 1829, and the Defendants Mr. *Irby* and *Herbert de Crespigny* were his executors and they proved his will. In *November*, 1830, the bill in this suit was filed in order to administer the trusts of the settlement, and also the estate of the testator. It prayed that the testator's estate might repay the trust funds, and that, to the extent of any deficiency, the trustees of the settlement might make it good.

The accounts were taken, and the estate of the testator would have been sufficient to replace the whole of the trust funds lent to him by the trustees, if the whole of his estate had been now forthcoming; but a sum of 8,937*l.* 19*s.* 10*d.* was found due from the executor *Herbert de Crespigny*, and, in consequence, the trustees of the settlement were ordered to make good the difference, which they accordingly did.

The original decree in *Irby v. Irby* was made in *April*, 1832, and a decretal order on further directions in *December*, 1857. By the latter, it was ordered, that *Herbert de Crespigny* should pay 8,937*l.* 19*s.* 10*d.*, the amount found due from him, into Court, and in default, his father's creditors had liberty to apply for payment out of his share of the settlement funds.

Herbert de Crespigny made default in payment, and in *May*, 1858, on the application of *Drummond* (a creditor of the testator) it was ordered, that the 8,937*l.* 19*s.* 10*d.*, ordered to be paid by *Herbert de Crespigny*, should be a charge on his share of the settlement funds standing in Court.

It

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(No. 3.)

It is now necessary to advert to the mode in which *Herbert de Crespigny* had dealt with his share in the settlement funds prior to and pending the suit.

By an indenture dated the 14th of *February*, 1829, *Herbert de Crespigny*, in consideration of 700*l.*, granted to *Charles Cottrell*, *George Kinderley* and *Georgiana Cottrell* an annuity of 70*l.*, and he assigned to *Charles Herbert Cottrell* all his share of the settlement funds upon trusts for securing it.

In the month of *July*, 1841, after the decree in the suit had been pronounced, *Herbert de Crespigny*, on his separation from his wife, made a deed of arrangement, by which, for valuable consideration, he assigned to trustees (*Nesham* and *Windham*) his share in the settlement funds, upon trust to raise 1,100*l.* and thereout to pay 700*l.* for the redemption of the annuity of 70*l.*, and to pay the residue of the 1,100*l.* to *Herbert de Crespigny* for his own use; and as to the rest of the trust moneys, to hold them in trust for himself for life, then to his wife for life, and afterwards to the two eldest daughters of the marriage.

In pursuance of this arrangement, by an indenture dated the 10th of *December*, 1841, and made between *Charles Herbert Cottrell* of the first part, *George Kinderley* and *Georgiana Cottrell* of the second part, *Nesham* and *Windham* of the third part, *Herbert de Crespigny* of the fourth part, and *George Herbert Kinderley* of the fifth part, after reciting that *George Kinderley* and *George Herbert Cottrell* had agreed to accept 700*l.* for the re-purchase of the annuity of 70*l.*, and to lend *Herbert de Crespigny* the further sum of 400*l.*, it was witnessed, that in consideration of 700*l.*, as the consideration for the re-purchase and extinction of the

said annuity of 70*l.*, and of the further sum of 400*l.* paid, *Herbert de Crespigny* covenanted to pay the sum of 1,100*l.* with interest, and *Charles Herbert Cottrell*, *Nesham* and *Windham* (according to their right and interests and by the direction of *Herbert de Crespigny*) did assign, and *George Kinderley*, *Georgiana Cottrell*, *George Herbert Kinderley*, *Nesham* and *Windham* did release and confirm, and *Herbert de Crespigny* did assign and confirm unto *George Herbert Kinderley*, all the share of *Herbert de Crespigny* in the settlement funds, upon trust to raise 1,100*l.*, in satisfaction of that amount by the indenture of the 29th July, 1841, directed to be raised, and as to the residue of the share of *Herbert de Crespigny* (after satisfying thereout the said sum of 1,100*l.*), in trust to transfer the same to *Nesham* and *Windham* upon the trusts of the deed of the 29th day of July, 1841.

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IRBY.  
(No. 3.)

The parties to the deed of 1841 had notice of the proceedings in the suit and the claims under it, and the liability of *Herbert de Crespigny*. Under these circumstances, the question which came before the Court upon a written statement of facts was, whether, as to the share of the Defendant *Herbert de Crespigny* in the amount standing to the credit of these causes, "The Testator's Marriage Settlement Fund Account," or as to any part of such share, the 8,937*l.* 19*s.* 10*d.* and interest had priority over the incumbrances created by the several indentures above stated, or any of them.

Mr. *R. Palmer* and Mr. *Jessel*, for *Drummond* and the creditors of the testator, argued, that the equity to set off the demands upon *Herbert de Crespigny* in the suit against his share of the trust fund was paramount to every other claim; and, secondly, that the annuity having been extinguished, could not be set up as against the



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v.  
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(No. 8.)

the demands of the creditors, whose rights had clearly a priority over the persons claiming under the separation deed of 1841, which was executed *pendente lite*, and with notice of the proceedings.

Mr. *Follett* and Mr. *Busk*, *contra*, argued, that right of set-off could not affect prior purchasers for value, and that such right only accrued in 1857 upon the decree on further consideration. Secondly, that, upon the whole transaction, it was not the intention of the parties to extinguish the annuity, so as to give priority to the creditors, who, receiving the benefit of the re-purchase, must be subject to the obligation of having the price paid for it out of the trust fund.

*Cockell v. Taylor* (a); *Woodyatt v. Gresley* (b); *Skinner v. Sweet* (c); *Morris v. Livie* (d); *Ex parte Turner* (e); *Winchester v. Paine* (f); *Gaskell v. Durdin* (g) were cited.

The MASTER of the ROLLS reserved judgment.

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*The MASTER of the ROLLS.*

July 24.

As against *Herbert de Crespigny*, I think that no doubt could be entertained of the right of retainer against his share of the fund; but the question is, whether his creditors, to whom he has given specific charges on his interests in the settlement funds, are bound by the equity which would be enforceable as against him.

It

(a) 15 *Beav.* 103.

(b) 8 *Sim.* 180.

(c) 3 *Mad.* 244.

(d) 1 *Younge & C.* (C. C.)

380.

(e) 2 *De G., M. & G.* 927.

(f) 11 *Ves.* 194.

(g) 2 *Bale & B.* 170.

It is contended, that the separation deed of *July*, 1841, prevents the retention of *Herbert de Crespigny's* share to make good the debt due by him to the estate, and that to permit this, would be to extend the doctrine of equitable set-off, so as to pay a debt due from one person out of the property of another, merely because that property was subject to the control of equity, and passed to others during the suit. It is contended, that the case of the *Bishop of Winchester v. Paine* (a); *Woodyatt v. Gresley* (b), and *Morris v. Livie* (c), only extend to this:—that a Defendant, against whom specific relief is prayed by a bill, shall not, directly or indirectly, whether designedly or otherwise, defeat that relief by alienation during the pending of the suit, whether for value or otherwise; but that, in this case, no such relief was contemplated by the bill up to the original decree:—that this equity arose out of the accounts, and that the charge on the property dates only from the order on further consideration made in 1857, and that the effect of that order is simply, to make what was, at that time, the property of *Herbert de Crespigny* in the settlement money liable to make good his defaults, but not the property of others, and that that only was his property which was not subject to the rights of his wife and daughters under the settlement of *January*, 1841, who, as I have already stated, had purchased his share for valuable consideration.

But I think that this case stands on higher ground than the doctrine to be derived from the cases cited. I think that the estate of the testator, or the creditors on that estate, in this respect, are entitled to the same equity as that which the trustees of the marriage settlement

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v.  
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(a) 11 Ves. 194.  
(b) 8 Sim. 180.

(c) 1 Y. & C. C. 380.

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ment would be entitled to; and that the trustees of the settlement, if called on to make good and divide amongst the *cestuis que trust* their share of the settlement money, would be entitled to say to *Herbert de Crespigny*, that, in respect of this sum, he was not so much bound to repay them out of the estate of his testator, as that he must be treated as having, by anticipation, received or retained payment of his share: and I think that this equity would be good against all persons who had taken an assignment of a charge upon *Herbert de Crespigny's* share, after having had notice of the claim of the trustees upon him.

It is, in fact, a charge on what had not been paid to and spent by *Herbert de Crespigny*, and then remained due to him. That all the parties to the deed of *July, 1841*, had such notice cannot be disputed; they were well aware of the suit, and of the claims made under it, and the liability which *Herbert de Crespigny* was under, to make good his debt to the estate of the testator, and that for that purpose, if necessary, everything coming to him under the settlement would be applicable. This, I think, is the principle of the case of *Ex parte Turner (a)*, to which I was referred by Mr. *Jessel*.

This disposes of the larger part of the contest in this case, but not of the whole, and for this purpose it is necessary to refer to some facts which I have purposely passed over, intending to keep the two questions distinct.

In *February, 1829*, *Herbert de Crespigny* granted an annuity of 70*l.*, and assigned his share of the settlement money to secure that annuity. This was prior to the death of Sir *William*, and before *Herbert de Crespigny*

was

(a) 2 De G., M. & G. 927.

was an executor or a debtor. This annuity would, therefore, clearly have priority over any claim which the trustees of the settlement, or any person claiming under them, or any creditor of the estate of Sir *William de Crespigny*, could have against *Herbert de Crespigny* in his character of executor.

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IRBY  
v.  
IRBY.  
(No. 3.)

It was one of the stipulations and provisions of the deed of *July*, 1841, that the 1,100*l.* agreed to be raised should be applied, as far as 700*l.* would go, in redeeming this annuity. This was accomplished by a deed of 10th of *December*, 1841. The deed is to this effect—[*His Honor stated it, see ante, p. 634*].

It is not disputed that the annuity, if it had been kept on foot, would have had priority over the claim of the creditors; but it is contended, that as this annuity is expressly extinguished by the deed of *December*, 1841, pursuant to the trusts of the deed of *July*, 1841, by which it was agreed that it should be extinguished:—that it cannot now be revived; and that a new mortgage is created with the intention of all parties.

I have, after some hesitation and a careful perusal of the deed itself, come to the conclusion, that though the annuity itself is extinguished, still that the property on which the annuity was charged, and by which it was secured, and which is assigned over by this deed, is still available for the purpose of making good the redemption money of that annuity; and that the persons who have redeemed and extinguished it are, upon the whole of this transaction, entitled to stand in the same situation, so far as the purchase-money was applied for that purpose, as if the annuity had been assigned to them and simply kept on foot. I am certainly

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(No. 3.)

tainly unable to fix upon any precise words in the indenture that lead to this result, but this is, in my opinion, the effect of it upon the whole transaction. It certainly was not the intention of the parties to this deed to give priority to any other claims in the suit then pending. I think that the meaning of the transaction between the parties was that which I have stated, and that it is not open to any stranger to take advantage of the technical words "extinction of the said annuity" to be found in these deeds, for the purpose of saying, that the property which secured that annuity is not also a security, in the hands of the person who redeemed it, for the repayment of the money employed for that purpose.

The creditors of Sir *William* obtain the advantage of the repurchase of the annuity, which, but for this transaction, would have been kept on foot, and would have had priority over them and diminished the value of their estate. They can only, in my opinion, take advantage of the transaction by paying, or permitting to be paid, out of the estate of which they take the benefit, and which secured the annuity, the redemption money which has released the property which they take from the prior charge upon it.

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1858.

## DRAKE v. DRAKE. (No. 1.)

ON the hearing of this case, upon a motion for a decree, inquiries were directed to be made, and, some extrinsic evidence, which was objected to, was directed to be entered *de bene esse*, saving just exceptions.

Jan. 28, 30.

It is not proper to enter in a decree evidence as "read *de bene esse*, saving just exceptions." If its admissibility be disputed, the point should be determined by the Court.

On a subsequent day,

*The MASTER of the ROLLS* said, in *Drake v. Drake*, which was before the Court the other day, the facts of the case were stated to me, but no point was argued. It was said there was some evidence which it was desirable to enter as read, but its admissibility having been questioned, I directed it to be entered *de bene esse*, saving all just exceptions. *Mr. Latham*, the registrar, has since very properly called my attention to two cases before *Lord Cottenham*, who very strongly reprobates that course, and points out the great inconvenience which arises from it, in the event of the case going to a higher tribunal. This would not occur here; but I am of opinion that the principle applies. The cases are *Watson v. Parker* (a) and *Parker v. Morrell* (b). *Lord Cottenham* makes observations upon the subject which induce me to consider that it would be improper to adopt the course I proposed.

The result, I think, will be this:—that if it be not stated in the decree, that the evidence was tendered and

(a) 2 *Phillips*, 9.(b) 2 *Phillips* 453.

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and rejected, it may be used in chambers, so far as it is proper evidence, upon the inquiries which I have directed. Unless some objection be made to that course, the evidence must not be entered in the decree, but, if the parties require it, I must have the point arising on the reception of the evidence argued and determined.

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Ultimately an order for preliminary inquiries was made and the motion for a decree ordered to stand over.

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## DRAKE v. DRAKE. (No. 2.)

July 13, 14, 15.

A testator after gifts to "his sister *M. F. T. D.*" and to his niece "*A. T. D.*" (but who were really the sister and niece of his wife), gave a portion of his residue to "his niece *M. F. T. D.*" He had no niece of that name. The Court being unable to come to a conclusion whether the word "niece" had been by mistake substituted for "sister" or the name *M. F. T. D.* for *A. T. D.* Held, that the gift of the residue was void for uncertainty.

SIR *Hugh Richard Hoare* made his will, dated the 25th of April, 1854, as follows:—"I give and devise unto my nephew, *Thomas Drake Tyrwhitt Drake*, my dwelling-house, No. 118, in *Eaton Square, London*:" I give and devise my messuage or dwelling-house and lands situate at *Burnham* "unto my sister *Mary Francis Tyrwhitt Drake*," for her life, "and from and after her decease, I give, devise and bequeath the same unto my niece *Anne Tyrwhitt Drake*:" I give the cottage at *Castle Cary* to my steward Mr. *John Clarke*, his heirs and assigns. He appointed "the said *Thomas Drake Tyrwhitt Drake*, *Frederick William Tyrwhitt Drake* and *John Palmer*, of No. 10, *Maida Hill West, London*, esquire, executors," and directed them to pay certain legacies, and proceeded thus:—"And subject to the payment of such legacies and my debts, funeral and testamentary expenses, I give, devise and bequeath all the rest and residue of my real and personal estate, whatsoever and wheresoever, to the said *Frederick William Tyrwhitt Drake*, *John Palmer*, my niece *Mary Francis Tyrwhitt Drake* and *Jane Labbett* equally between them."

The

The testator died in 1857.

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The question which arose was, who was entitled to the share of the residue given to "*my niece Mary Frances Tyrwhitt Drake*," there being no person who strictly answered that description. It was claimed, first, by his wife's sister *Mary Frances Tyrwhitt Drake*, to whom the testator had devised his *Burnham* property for life by the erroneous description of "*my sister*;" secondly, by his wife's niece *Anne Tyrwhitt Drake*, to whom testator had devised the *Burnham* property in remainder by the erroneous description of "*my niece*."

It was claimed, thirdly, by the heir and next of kin of the testator, who contended that the gift was void for uncertainty.

There were sixteen other nieces of his wife, named "*Tyrwhitt Drake*," but none of the name of "*Mary*" or "*Frances*," except one named *Mary Elizabeth Tyrwhitt Drake*, who had disclaimed.

Mr. *Greene* and Mr. *Hobhouse*, for the Plaintiffs *Frederick William Tyrwhitt Drake* and *John Palmer*.

Mr. *Begbie* for *Jane Labbett*.

Mr. *R. Palmer* and Mr. *Surrage*, for the testator's sister-in-law *Mary Francis Tyrwhitt Drake*, relied on the maxim "*veritas nominis tollit errorem demonstrationis*."

Mr. *Martindale*, for the wife's niece, *Anne Tyrwhitt Drake*, insisted that the "*niece*" was intended and that the name was erroneous.

Mr. *Selwyn* and Mr. *G. L. Russell*, for *Frances Isabella Tyrwhitt Drake*, and Mr. *Pearson*, for *Mary Elizabeth*



1858. *Elizabeth Tyrwhitt Drake*, suggested that the gift might be to his niece *Mary* and *Frances Tyrwhitt Drake*.

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Mr. *Follett* and Mr. *Giffard* for the next of kin were not heard.

The following authorities were relied on:—*Ryall v. Hannam* (a); *Re Blackman* (b); *Adams v. Jones* (c); *Bernasconi v. Atkinson* (d); *Standen v. Standen* (e); *Fox v. Collins* (f); *Doe v. Huthwaite* (g); *Lord Camoys v. Blundell* (h); *Bennett v. Marshall* (i); *Wigram on Wills* (k); *Attorney-General v. Grote* (l); *Fox v. Collins* (m); *Doe d. Westlake v. Westlake* (n); *Underwood v. Wing* (o).

#### *The MASTER of the ROLLS.*

July 15.

I have had time to consider this case very carefully, and I am satisfied that it is totally impossible, on the face of the will, to ascertain whom he meant by the words "my niece *Mary Frances Tyrwhitt Drake*." As to the extrinsic evidence, it does nothing more than this: it shews that the testator had great affection for one particular person, and also a great affection for another person, and, therefore, that it is extremely probable that these two would become objects of his bounty; but it does not clear up the difficulty in the slightest degree, or assist me, in the least, in coming to a conclusion as to whom he intended to designate by these words, or what disposition he desired to make of this

- (a) 10 *Beav.* 536.
- (b) 16 *Beav.* 377.
- (c) 9 *Hare*, 485.
- (d) 10 *Hare*, 345.
- (e) 2 *Ves. jun.* 589.
- (f) 2 *Eden*, 107.
- (g) 3 *Barn. & Ald.* 632.
- (h) 1 *H. of L. Cas.* 785.

- (i) 2 *Kay & J.* 740.
- (k) *Pages* 17, 92, 169.
- (l) 3 *Mer.* 321.
- (m) 2 *Eden*, 107.
- (n) 4 *Barn. & Ald.* 57.
- (o) 19 *Beav.* 459; 4 *De G., Mac. & Gor.* 633.

this share of the residue. On looking at the will, the only conclusion to be come to is one of three : namely, that by these words, "my niece *Mary Frances Tyrwhitt Drake*," the testator means, "my sister *Mary Frances Tyrwhitt Drake*," or "my niece *Anne Tyrwhitt Drake*," or that he means both.

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I concur generally in the observations made on the reported cases ; and if I had found on the will nothing more than this :—" I give the residue to my niece *Mary Frances Tyrwhitt Drake*," the inaccuracy of the description would not have created an insurmountable difficulty, but the correct name of the person would prevail ; and I should be convinced that "*Mary Frances Tyrwhitt Drake*," the sister in law, was the person who was to take a share of the residue. But the difficulty I have in applying that rule to the present case is this : the testator, in the same will, devises certain property to "my sister *Mary Frances Tyrwhitt Drake*" only a few lines before, and he must, therefore, have had the fact of her being his sister present to his mind at the time, besides having mentioned his niece *Anne Tyrwhitt Drake* in a former part of his will.

The cases, no doubt, are useful for the purpose of indicating the general principle by which the Court must be guided in matters of this description, but I look in vain for any case that can govern this particular instance or is identical with it. The question is, assuming that if the legacy were given to "my niece *Mary Frances Tyrwhitt Drake*," his sister in law, "*Mary Frances Tyrwhitt Drake*," would take, notwithstanding the inaccurate description of "my niece" prefixed to it, and nothing else occurred in the will, whether I can attribute the same meaning to the words in a will where the testator has immediately before made a devise

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to his "sister *Mary Frances Tyrwhitt Drake*." Suppose he had said, "I give 1,000*l.* to my sister *Mary Frances Tyrwhitt Drake*," and, afterwards, "I give 1,000*l.* to my niece *Mary Frances Tyrwhitt Drake*," could the same person take both legacies? These two different descriptions being in that sort of juxtaposition, would it be possible for the same person to take both legacies? The testator, if he had intended that, would simply have given a legacy of 2,000*l.* to the legatee. It is true the same observation does not apply here in the same pointed manner, because the one devise is of a specific property, and the other a gift of the residue; but still I think it impossible to hold that he means the same person, or that he meant a person whom he had previously called by her correct description of sister, by the words "my niece *Mary Frances Tyrwhitt Drake*." Then the question is, what other person is to take under that designation. I find that he had no niece of that name; if there had been, she, without any question, would have taken. In my opinion, it is obvious on the evidence, that the testator has either, by mistake, inserted the word "niece" instead of "sister," or has put the words, "*Mary Frances*," instead of "*Anne*;" but which of the two he really did mean, I am totally unable to ascertain.

The Court, in construing wills, is anxious, if possible, to avoid an intestacy, and I have endeavoured to do so in this case. I have, therefore, considered, whether I could construe it in this way, and divide it into fifths, by treating it as a gift "to *Frederick William Tyrwhitt Drake*, to *John Palmer*, to my niece, to *Mary Frances Tyrwhitt Drake* and to *Jane Labbett*." No doubt it would be very satisfactory to me if I could come to that conclusion, and so avoid an intestacy. But I am satisfied that this is not his will. If I could so divide it,

it, or if the words had been "my *said* niece," I should be of opinion that *Anne Tyrwhitt Drake* was the person to take, being the only niece previously mentioned in the will, and that I could not go into the question, whether any other niece was more an object of his bounty or favor.

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I am also clear I cannot read it thus:—"my niece *Mary, Frances Tyrwhitt Drake* and *Jane Labbett*," putting a stop between *Mary* and *Frances*, and introducing *Frances Tyrwhitt Drake* as another legatee, for then it ought to be "my nieces *Mary* and *Frances Tyrwhitt Drake*."

But really all these various modes of construing this gift only shew the extreme difficulty which the Court would have in attempting to do anything more than construe the words according to their plain and obvious meaning, for they are very simple, if the facts would satisfy them. There is a gift to "his niece *Mary Frances Tyrwhitt Drake*," and there is no person to satisfy it, and I am totally unable to ascertain whom the testator meant.

My belief, I repeat, is, that the testator has made a mistake, either by introducing the word "niece" instead of "sister," or by introducing the words "*Mary Frances*" instead of "*Anne*," but I am unable to say which of the two it is.

Finding it impossible to come to a conclusion as to who is meant, the only thing I can do is, to declare that this bequest of one-fourth of the residue is void for uncertainty.

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ADAMS v. BECK.

June 8.

A. B., on his marriage, settled real estates on himself for life, then to trustees for a term to raise portions for his younger children, and subject thereto, to his first and other sons in tail. The portions were to vest in sons at twenty-one, but to be payable after the decease of the husband and wife. *George*, the second son, attained twenty-one, after which *William*, the eldest son, having barred the entail, died without issue, and, subsequently, the portions became payable. *Held*, that *George*, though the eldest at the period of distribution, was entitled to a share of portions for younger children.

BY the settlement made on the marriage of *Henry Cadwallader Adams* with *Emma Curtis*, and dated in 1803, certain hereditaments were conveyed to the use of *Henry Cadwallader Adams* for life, with remainder (subject to a provision by way of annuity for *Emma Adams*) to the use of trustees for 1,000 years, and subject thereto, to the use of the first and other sons of the marriage, severally and successively, in tail male, and in default, to the daughters as tenants in common in tail, &c. &c.

The trusts of the 1,000 years' term were as follows:— that in case there shall be any child or children of *Henry Cadwallader Adams* by the said *Emma Curtis*, other than or besides an eldest or only son, who, by virtue of the limitations hereinbefore contained, shall be entitled to the said hereditaments "for an estate in tail male in possession or in remainder immediately expectant upon the said term of 1,000 years," then in trust to raise 6,000*l.* "for the portion or portions of such child or children (other than or besides an eldest or only son, so for the time being entitled as aforesaid)." And it was thereby agreed, that the 6,000*l.* should vest and be paid to the children for whom the same was thereby intended to be provided at such ages, days or times, &c.,

as

DATES.

1803. Settlement.

1854. Death of eldest son.

1828. Second son attained vested interest.

1857. Fund became distributable.

as *Henry Cadwallader Adams*, by deed or will, should appoint; and in default of such appointment, if there should be but one such child, other than and besides an *eldest or only son*, so for the time being entitled as aforesaid, the said sum of 6,000*l.* should be an interest vested in a son at *twenty-one*, and in a daughter at *twenty-one* or marriage, and should be paid or assigned to him or her on or at the same age, day or time, if the same should happen after the decease of the survivor of them *Henry Cadwallader Adams* and *Emma Curtis*, but if the same should happen in the lifetime of *Henry Cadwallader Adams* and *Emma Curtis* or the survivor of them, then immediately after the decease of such survivor; and if there should be two or more such children (other than and besides an *eldest or only son*, so for the time being entitled as aforesaid), then in default of such appointment, as aforesaid, the sum of 6,000*l.* should be paid and divided among such two or more children in equal shares, the shares of sons to vest at *twenty-one*, and of daughters at *twenty-one* or marriage, and should be paid or assigned on or at the same ages or times respectively, if the same respectively should happen after the decease of the survivor of them *Henry Cadwallader Adams* and *Emma Curtis*, but if the same should happen in the lifetime of them *Henry Cadwallader Adams* and *Emma Curtis*, or of the survivor of them, then immediately after the decease of such survivor.

The settlement then provided, that if there shall be more than one child for whom portions were intended to be hereby provided, as aforesaid, and any of them being a son or sons shall depart this life, or become an eldest or only son entitled as aforesaid under the age of *twenty-one* years, or being a daughter or daughters shall depart this life without being or having been married,

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married, and under the age of twenty-one years, then the share intended for him was to accrue to the survivors or survivor and others and other of such children, not being an eldest or only son entitled as aforesaid. There was a similar clause of accruer if more than one died under the same circumstances.

The settlement also contained powers of maintenance, education and advancement.

Henry Cadwallader Adams died in 1842, and *Emma* his wife died in 1857, and the 6,000*l.* then became payable.

There were eight children of their marriage who attained twenty-one, namely, *Henry William Adams* (the eldest son), born in 1805, the Defendant *George Curtis Adams* (the second son), born in 1807, and six others. A ninth child died an infant and unmarried. The eight children were all living, except the eldest, *Henry William*.

Henry William Adams, the eldest son, barred the entail and died in 1854, leaving no issue, but having devised his real estates to *George Curtis Adams* for life, with remainder to his first and other sons in tail, &c. &c. On the death of his eldest brother, *George Curtis Adams* became the eldest son. On his marriage in 1847 he had assigned all his interest in the 6,000*l.* under the settlement to the Plaintiffs, his trustees.

The Plaintiffs filed this bill, stating that a question has arisen, whether, under the circumstances, the Plaintiffs, as representing the interest of the Defendant *George Curtis Adams* therein, were entitled to share with his younger brothers and sisters in the 6,000*l.* to
be

be raised under the trusts of the term of 1,000 years, as portions for the younger children of *Henry Cadwallader Adams* and *Emma Adams*, or whether such younger brothers and sisters of *George Curtis Adams* were exclusively entitled to the whole.

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The bill prayed a declaration that the Plaintiffs, as representing the interest of *George Curtis Adams* in the sum of 6,000*l.*, were entitled to one-seventh part thereof, and that the 6,000*l.* and interest might be raised and paid.

Mr. *Follett* and Mr. *Bowring* for the Plaintiffs.
1st. The second son, *George*, is entitled to a share of the 6,000*l.*, for he is not an eldest son within the terms of the settlement, nor is he entitled, "by virtue of the limitations," to the hereditaments "for an estate tail immediately expectant upon the term of 1,000 years."

2ndly. He obtained a vested interest on attaining twenty-one, and there is no provision in the settlement to divest it.

3rdly. The clause of survivorship makes the matter clear.

Mr. *Selwyn* and Mr. *Darby* for the younger children.
By the death of his elder brother, *George* became an eldest son, and was so at the period of distribution of the portions, which was the time for determining the character of eldest son.

Mr. *Bromhead* for the trustees.

The MASTER of the ROLLS declared, that, according to the true construction of the indenture of settlement of the 17th of *June*, 1803, in the events which had happened,

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pened, the Plaintiffs, as representing the Defendant *George Curtis Adams*, the second but now eldest surviving son of *Henry Cadwallader Adams* and *Emma* his wife, were entitled to one equal seventh part of the sum of 6,000*l.*, directed to be raised for the benefit of their younger children.

## ADAMS v. ADAMS.

June 8, 9.

The character of "eldest son" is, in ordinary cases, to be ascertained at the period of vesting, and not of payment.

Bequest to *A.* for life, and afterwards in trust for her children who, not being an eldest or only son, should attain twenty-one. In 1854, after *George*, the second son, had attained twenty-one, the eldest son died, and the second thereupon became eldest. The tenant for life died in 1857. Held, that *George*, though an eldest son at the time the fund became payable to the children, took a share.

IN 1803, *Emma*, one of the daughters of Sir *William Curtis*, married *Henry Cadwallader Adams*, and by the settlement made on that occasion, to which Sir *W. Curtis* was a party, certain hereditaments belonging to *Henry Cadwallader Adams* were conveyed to the use of *Henry Cadwallader Adams* for life, with remainder, subject to a provision for his widow, to the use of the first and other sons of the marriage, successively, in tail, with remainders over in strict settlement.

In 1828, Sir *William Curtis*, by his will, bequeathed 6,000*l.* to trustees for his daughter *Emma Adams*, for life, and after her decease as follows:—"in trust for the children now or hereafter to be born of *Emma Adams* who, not being an eldest or only son for the time being, shall, as to a son or sons, attain the age of twenty-one years, and as to a daughter or daughters, attain that age or marry, and to be divided between or amongst them, if more than one, in equal shares, and if but one, to that only child, his or her executors, administrators and assigns; and if there shall be no such child of *Emma Adams*, then I give the same to the son of the said *Emma Adams* who first or alone shall attain the age of twenty-one years. And I declare, that in respect of every child of *Emma Adams* who shall, for the

the time being, be immediately presumptively entitled to a portion under the trusts lastly aforesaid, the trustees or trustee of the same, for the time being, shall, after the decease of *Emma Adams*, during the suspense of vesting of such child's portion, under the same trusts, accumulate the interest, dividends and annual produce thereof, for the benefit of the person or persons who shall ultimately become entitled to the fund whence such accumulations shall have proceeded, to be considered as part thereof and applicable accordingly."

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He afterwards directed that the legacy of 6,000*l.* "should be considered as vested and transmissible interests immediately at or after his decease, but that the payment of the same should be postponed until after his wife's decease," but bear interest at the rate of 5*l.* per centum per annum, to be computed from his decease.

Sir *William Curtis* died in 1829, and the 6,000*l.* was paid by his executors to the trustees.

*Henry Cudwallader Adams* died in 1842, and his wife in 1857.

There were eight children of the marriage who attained twenty-one, namely, *Henry William Adams* (the eldest son), born in 1805, *George Curtis Adams* (the second son), born in 1807, and six others. A ninth child had died an infant and unmarried.

*Henry William Adams* died in 1854 without issue, and *George Curtis Adams*, who had attained twenty-one in 1828, then became the eldest son. He had assigned his share in the 6,000*l.* to the Plaintiffs, the trustees of his marriage settlement.

The

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The Plaintiffs insisted, that *George* was entitled to share in the 6,000*l.* with his younger brothers and sisters, and they claimed one-seventh of the fund ; but the trustees declined to act.

Mr. *Follett* and Mr. *Bowring*, for the Plaintiffs, argued that *George* participated in the 6,000*l.* legacy, for although at present the eldest son he was not so at the time when he attained a vested interest. That the words, "not being an eldest or only son for the time being," were referable to the time of attaining twenty-one, or of attaining a vested interest, and that it was clear that the fund was not to go over if any child attained twenty-one. That the accumulation "during the suspense of vesting" could only be until attaining twenty-one. That the testator had not placed himself *in loco parentis*, and, therefore, that the rule did not apply; *Hall v. Hewer*(a); *Wilbraham v. Scarsbrook*(b); *Lord Teynham v. Webb*(c); *Jarman on Wills*(d).

Mr. *Selwyn* and Mr. *Darby* for the Defendants. *George* is the eldest son, and, therefore, excluded by the very terms of the gift. The period of distribution is to be regarded in ascertaining the character of eldest son, for the object is to prevent a double provision. The children cannot be said to have an indefeasible interest on attaining twenty-one, for it is liable to a constant fluctuation, from time to time, by the birth of additional children.

Mr. *Bromhead* for the trustee.

The following authorities were also cited and commented

(a) *Ambler*, 203.

(b) 4 *Y. & Coll. (Exch.)* 116;  
1 *H. of L. Cas.* 167.

(c) 2 *Ves.* 198.

(d) *Vol.* 2, p. 168.

mented on:—*Lyddon v. Ellison* (a); *Heneage v. Hunloke* (b); *Matthews v. Paul* (c); *Windham v. Graham* (d); *In re Theed's Settlement* (e); *Livesey v. Harding* (f); *Jarman on Wills* (g).

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ADAMS  
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*The MASTER of the ROLLS* reserved judgment.

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*The MASTER of the ROLLS.*

In this case, I reserved the expression of my opinion on the question, whether, under the will of Sir *Wm. Curtis*, the second son of Mrs. *Adams*, viz., *George Curtis Adams*, would take a share in the 6,000*l.* legacy bequeathed, subject to her life interest, to her younger children, *George* at the time when the fund became payable being her eldest son. The result of the consideration I have given to the question since the argument has been, that I am confirmed in the view which I took in this and the former case of *Adams v. Adams*. The principle is carefully expressed by Sir *Thomas Plumer* in *Matthews v. Paul* (h), where he states, upon the result of the authorities, that there cannot be two periods, one for ascertaining who compose the class to take, and another to ascertain who are to be excluded.

June 9.

It was argued by Mr. *Selwyn*, that the vested interests cannot be ascertained because, by the birth of children down to the period of division, the class is capable of being enlarged. But there is no divesting except *pro tanto*, i.e. one who has attained twenty-one may take a less share by the birth of other children, but that he has a vested

(a) 19 *Beav.* 565.

(b) 2 *Atk.* 456.

(c) 3 *Swan.* 328; 2 *John Wilson*, 64.

(d) 1 *Russ.* 331.

(e) 3 *Kay & J.* 375.

(f) 2 *H. of L. Cas.* 419.

(g) *Vol.* 2, pp. 167, 177.

(h) 3 *Swan.* 328.

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a vested interest was certain when he attained twenty-one years. That being so, the observation of Sir *Thomas Plumer* appears to me to be unanswerable, that there cannot be two periods, one to ascertain that a child is to take, and another to ascertain that he is not to take.

This, however, may occur:—A testator may say, “I do not intend any child to take any share in the legacy unless, at the period of distribution, he shall fulfil the condition of not being an eldest son.” That is what took place in *Livesey v. Livesey* (a). The class was to be ascertained when the youngest child of *Eliza Livesey* attained twenty-one, and there was a direction that the son who was or should become an eldest son should not take anything under the devise or bequest, and consequently the person who filled the character of eldest son at that period could not take. Unless the testator has said, “I do not intend a person to take any interest who, at time of distribution, fills the character of eldest son,” I think that the character of eldest son is to be ascertained when the interest becomes vested.

It would be very difficult for trustees to know how to act in respect of question of advancement, if a child was afterwards to take nothing.

It is in trust for the children who, not being an eldest or only son for the time being, shall attain twenty-one. That is, for those who shall not be an eldest son at the time of his attaining the age of twenty-one. The gift is to be vested at that period, and being once vested, there is nothing to take it out of him, except to a limited extent by the subsequent birth of other children.

This

(a) 13 Sim. 33; 2 H. of L. Cas. 419.

This construction is confirmed by the subsequent clause, which directs that the 6,000*l.* "shall be considered as vested and transferable interests immediately at or after his decease, but that the payment of the same shall be postponed until after his wife's decease." This, I think, means vested and transmissible interests in those children who fulfil the condition previously prescribed, namely, those who, not being an eldest son, attain twenty-one, and that the vesting of their shares is not to be postponed until the period of distribution.

I am of opinion, that *George* takes a share in the 6,000*l.* as well as the other six children.

It is true, that in some later cases it is said, that the period is either that of vesting or of distribution, but this cannot be capricious; and I am of opinion that, unless it is otherwise expressed, the period of vesting, and not the period of distribution, is the time for determining, in these cases, whether a child is or is not an elder son.

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ABSTRACT OF DECREE.

Declare, that according to the true construction of the will of Sir *William Curtis*, Baronet, in the events which have happened, the Plaintiff, as representing *George Curtis Adams*, the second, but now eldest surviving son of *Henry Cadwallader Adams* and *Emma* his wife, are entitled to one equal seventh part of the legacy of 6,000*l.*

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1858.

ADAMS  
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1858.

## ADAMS v. ROBERTS.

July 23.

Under a trust for *A.* for life, "and after her decease, to be divided equally between her younger children." *Held*, first, that the children took vested interests at their births; and, secondly, that the character of "younger child" was to be determined at the period of vesting, and not that of distribution.

Distinction in regard to vesting, between a direction to "divide amongst a class" at once, and such a direction after a tenancy for life.

*Beck v. Burn*, 7 *Beav.* 492, doubted.

IN 1803, on the marriage of *Henry Cadwallader Adams* with *Emma*, the daughter of Sir *Wm. Curtis*, a settlement was executed, by which real estates were settled on *Henry Cadwallader Adams* for life, with remainder to his first and other sons in tail.

Sir *William Curtis*, after the execution of the settlement, invested several sums of money in the names of trustees for the benefit of his daughter *Emma Adams* and, after her decease, for her children.

Sir *William Curtis* died in 1829, and at that time the trust fund so created by him consisted of 2,304*l.*, lent by the trustees on mortgage, and 2,666*l.* 15*s.* 10*d.* Three per Cent. Consolidated Bank Annuities, standing in the joint names of the four trustees. It was believed that Sir *William Curtis* never executed any declaration of trust of the trust property; and in consequence of this belief, the three surviving trustees, on the 1st of *June*, 1843, executed a deed, declaring the trusts of the property in favor of Mrs. *Adams* for life, and afterwards for her children, not being an eldest, who should attain twenty-one, &c.

*Henry Cadwallader Adams* died in 1842. There were nine children of the marriage, one of whom died an infant. The eldest son of the marriage died in 1854 without issue, and thereupon *George Curtis Adams*, who had attained twenty-one in 1828, became the eldest son. Mrs. *Adams* died in 1857.

A declaration

A declaration of trust was subsequently discovered on the 16th *February*, 1858, consisting of an ordinary bank stock receipt, dated the 23rd *April*, 1807, for the purchase of 1,002*l.* Consolidated Three per Cent., on the back of which was endorsed the following memorandum:—

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“ This stock, with all that may hereafter be added thereto, we hereby declare to be in trust to pay the interest thereon to Mrs. *Adams* (wife of *Henry Cadwallader Adams*, of *Anstey Hall*, near *Coventry*), for her whole sole use and benefit, not to be liable to the debts, covenants or engagements of her said husband, and after her decease to be equally divided between her younger children, i. e., every child save the elder son, who is and will be well provided for.”

“ *W. C.*

“ Witness,

“ *J. P. Le Jeune.*

“ 2666*l.* 15*s.* 10*d.*

“ In *Jan.*, '46.”

This was signed by the four trustees and by Sir *William Curtis* with his initials at the end of the memorandum.

Upon this being discovered, the Plaintiffs, who were the assignees of the interest of *George Curtis Adams*, claimed one-seventh of the two sums, and by this bill they prayed a declaration:—

That the memorandum endorsed on the Stock receipt was a valid declaration of trust by Sir *William Curtis* of the two sums of 2,666*l.* 15*s.* 10*d.* Consols and 2,304*l.* sterling; and that the true construction of the memorandum might be declared accordingly.



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That the deed of the 1st of *June*, 1843, might be declared to be void.

That it might be declared, that in the events which had happened, the Plaintiffs, as representing the interest of the said *George Curtis Adams*, were entitled to one seventh part of these two sums.

Mr. *Follett* and Mr. *Bowring* for the Plaintiffs.

According to the decision of the Court in *Adams v. Adams* (a) and *Adams v. Beck* (b), *George* became entitled to a share in the fund; *In re Theed's Settlement* (c); *Matthews v. Paul* (d); for he was not an eldest son at the time his share became vested. Though the gift is in the direction at her death to "divide," still it is vested; for the postponement of the division until after the expiration of life estate was for the convenience of the fund; *Jarman on Wills* (e); and see *Leeming v. Sherratt* (f); *Packham v. Gregory* (g). The case of *Leake v. Robinson* (h) does not apply to this case.

Mr. *Bromhead* for the trustees.

Mr. *Selwyn* and Mr. *Beck*, *contra*.

We do not dispute the principle already decided in this Court in the case of *Adams v. Adams*, that the period of vesting is the time for ascertaining the character of eldest son; but here the author of the trust intended the vesting to take place at a future period.

There is no gift but in the direction to "divide," and the vesting is therefore postponed till the period of division,

(a) *Ante*, p. 652.

(b) *Ante*, p. 648.

(c) 3 *Kay & J.* 375.

(d) 3 *Swan.* 328.

(e) *Vol.* 1, 715 (2nd edit.).

(f) 2 *Hare*, 17.

(g) 4 *Hare*, 398.

(h) 2 *Mer.* 363.

division, which is to be at the death of the tenant for life; *Beck v. Burn* (a); *Chance v. Chance* (b); *Chevauz v. Aislalie* (c). At that period *George* was an eldest son, and was therefore excluded from participating in a fund provided for younger children only.

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Independently of my decision on former occasions, this is a clear case, and all the authorities are easily reconcilable.

There is no doubt that when there is no gift except in the direction to divide, the gift takes effect at the period of division, and the class is then to be ascertained; but if there be a previous life estate, and the division is postponed merely for the convenience of the estate, the case is otherwise. Supposing this stock had been given without any life estate, by a simple direction to divide it between the children at twenty-five; those only who attained that age could take. But when it is given to one for life, and afterwards to be divided between his children, they who survived the testator would all take.

Here the gift is to Mrs. *Adams* for life, and after her decease, equally between her younger children. The direction that it is to be divided does not add to or take away from the gift which is to them equally.

With the exception of *Beck v. Burn* (a), which I do not consider governs this case, and which I should hesitate to follow, this is consistent with all the authorities on the subject.

I will

(a) 7 *Beav.* 492.

(c) 13 *Sim.* 71.

(b) 16 *Beav.* 572.

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I will make a declaration that the memorandum endorsed on the stock receipt is a valid declaration of trust in favor of *Emma Adams* for her life, and after her death, for her younger children, according to the declaration hereinafter contained, and that the two funds are now subject to the trusts thereof, and that, according to the true construction of the memorandum, and in the events which have happened, all the children of *Emma Adams*, except the eldest child *Henry William Adams* deceased, took vested and indefeasible interests in the two sums, which, upon the death of *Emma Adams*, became divisible into eight equal shares, one of which belongs to the Plaintiffs.

Feb. 24, 25.

A pleading is to be taken most strongly against the pleader, and where a bill contains general and specific allegations as to the same matter, the general allegation must be referred to the particular and specific one.

Directors having entered into a contract, *ultra vires*, and which was not binding on the Company, *Held*, that it could be neither specifically performed, nor could the Court order them to make good their representations.

ELLIS v. COLMAN, BATES and HUSLER.

THE case came on upon two general demurrers to a bill, which stated in substance the following case :—

In 1851, Messrs. *Ellis* and *Husler* entered into a contract with the *Waterford and Kilkenny Railway Company*, for the construction of about half of the line. The probable cost was about 140,000*l.*, but liable to be curtailed or varied.

The company had then no pecuniary resources at their command to provide for the completion of their line, but an arrangement was then in progress, with the Public Works Loan Commissioners, for the loan of a sum of 40,000*l.*, of which, it was provided in the contract

tract with *Ellis* and *Husler*, that 26,000*l.* should be applied towards payment of what might become due to them under their contract; and it was also provided, that the excess over that sum should be paid them in 5*l.* shares, issued under the powers conferred on the company by "The *Waterford and Kilkenny* Railway Amendment Act, 1850," bearing a preferential dividend of 6*l.* per centum per annum, on each of which shares 3*l.* were to be considered as paid up.

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The bill stated :—" 8. That such of the preference shares as had been previously issued to the public had been so issued, with an intimation that no further call beyond the 3*l.* per share was intended or would be made upon those shares, and that the following were the terms in which they were *advertised by the Company* :—

" *Waterford and Kilkenny* Preference Shares.
40,000*l.* of 5*l.* each *nominally*, but only 3*l.* in
reality.

" These shares are issued at 5*l.* each, but no more than 3*l.* will be called up, the Government Loan Commissioners objecting to advance 40,000*l.* unless the shares were issued at 5*l.* each. To close the capital account 160,000*l.* are required *and no more*, which consists of 120,000*l.* in the shape of 40,000 shares of 3*l.* each, and 40,000*l.* the amount of the loan."

" 9. Pending the negotiations between the company and *Ellis* and *Husler* the liability of the latter to payment of calls on the preference shares was repeatedly discussed, which was met by positive and unqualified assertions, on the part of the board and its officers, that no call would or could ever be made; and as far as possible to satisfy the contractors that in any event no payment

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ment of calls should ever be required from them, the managing director, the Defendant *Bates*, through whom the negotiations were principally if not altogether conducted, *undertook to obtain a positive engagement on the part of the directors* by deed, agreement or resolution which should, as he said, set at rest all doubts.

10. In the deed of contract, dated the 30th of *May*, 1851, between the contractors and the company, "at the request of the company's solicitor, who said he thought it would be better for all parties, no provision was introduced for exempting Messrs. *Ellis* and *Husler* from the payment of any future calls upon the preference shares to be taken by them in payment. It was nevertheless clearly understood at the time, by all parties to the said deed, that such was to be the arrangement, and it was upon this express understanding that *Ellis* and *Husler* executed the said deed."

11. Subsequently to the execution of the contract, the company alleged that the said loan commissioners had declined to make any advance to the company until a large specified portion of the said preference shares had been subscribed for, and "the directors proposed to *Ellis* and *Husler* that they should subscribe for 16,670 shares, but that such shares should only, in fact, be delivered to them, as and when, according to the terms of their contract deed, they would be entitled to shares in payment for work done. *Ellis* and *Husler* having acceded to this proposal, a preferential share deed, with reference to such subscription, was, in the month of *June*, 1851, tendered by the directors to them for execution."

12. The share deed contained a covenant for payment of all future calls in respect of the shares thereby subscribed

scribed for; and *Ellis* and *Husler* having on that ground objected to execute the said deed, as being inconsistent with the aforesaid arrangement, *Bates*, with the view of removing such objection, addressed the following letter to *Ellis* and *Husler*, dated the 25th of *June*, 1851:—

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“It appears, however, there is another objection. You do not like to sign for shares on which 3*l.* are paid, when there exists a possibility of 5*l.* being called up. Had this been stated before, the difficulty would have been instantly removed. It would be manifestly unfair, on the part of the board, to impose any additional payment upon you: such an event would be contrary to the entire spirit of the contract, as well as to the letter. I will, therefore, obtain for you a letter from the board, undertaking, in the event of such a circumstance taking place, either to receive the payment of the additional amount called up from you in preference shares, or exchange the 3*l.* shares for paid-up 5*l.* shares. If this will be satisfactory to you, please say so, and I will obtain a resolution to that effect on Monday next.”

13. On the faith of this letter, *Ellis* and *Husler* executed the share deed for the 16,670 preference shares, and agreeably to the undertaking contained in the said letter, the following resolution was passed unanimously at a board meeting of the directors of the company, held on the 5th of *September*, 1851:—“Messrs. *Ellis* and *Husler* having requested that the board would pass some resolution indemnifying them from the payment in cash of future calls, over and above 3*l.* per share, upon the shares to be taken by them in pursuance of their contract, and agreeing to accept a proportion of such shares in payment of such calls, in case they should hereafter be made, it was resolved, ‘that the board accede to such proposition.’”

14. A minute

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14. A minute of the said resolution was duly entered in the books of the company, and a copy thereof was by order of the said directors on the same day sent by the secretary to *Ellis* and *Husler*.

15. Four directors were present at the said meeting, and they all concurred in passing the resolution, and in ordering a copy thereof to be sent to *Ellis* and *Husler*, viz. the Defendants *Colman* and *Bates*, and two others, who were alleged to have died insolvent.

The bill then stated as follows:—"16. The letter of *Bates* and the said resolution amounted to an express agreement and undertaking by the Defendants *Colman* and *Bates* and the other directors who concurred in passing the resolution, on the part of the company, to indemnify *Ellis* and *Husler* from any payment in cash of future calls, over and above 3*l.* per share upon the shares to be taken by them under their contract, and for acceptance, by the company, of a proportion of such shares at par in payment of such calls; and the last-named Defendants, by joining in such resolution, and causing the same to be sent to *Ellis* and *Husler*, and otherwise representing to *Ellis* and *Husler* that the company, of whom they were the agents, had power, by the terms of their act and otherwise, to enter into the said agreement, and that they were duly authorized by the company to enter into the same on their behalf, induced *Ellis* and *Husler* to believe such representation to be true."

The bill also contained these allegations:—"33. At the time when the resolution was passed, and throughout the whole of the preceding transactions with the Plaintiff and *Husler*, *Colman* and *Bates* "were well aware, as the fact is, that the company had no power to enter into

into the agreement respecting the said shares contained in the letter of *Bates* and the resolution, and that they were not authorized by the company to enter or attempt to enter into the same on their behalf;" but they concealed the same from the Plaintiff and *Husler*, "and led them to believe, on all occasions, that they were authorized by the company to enter into the said agreement, and that the same was within the powers of the company, and would be strictly carried out and acted upon by the company."

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The contractors proceeded to complete the railway, and received payment in money and a very considerable number of the shares. The company afterwards called up the remaining 2*l.* per share on these 5*l.* shares, and (*Husler* being dead) required payment from the Plaintiff *Ellis* in respect of 12,164*l.* of such shares held by him, and commenced an action to recover the amount. The Plaintiff *Ellis* tendered shares in payment of the call, in accordance with the resolution of the 5th of *September*, 1851, but the company refused to accept them.

The shares had fallen to a discount, and the Plaintiff alleged, that the loss sustained by him, from the repudiation of the company of the resolution, had been upwards of 16,000*l.*

The Plaintiff submitted, that *Colman* and *Bates* were personally bound by the agreement, and ought to be decreed to indemnify the Plaintiff and the estate of *Husler* from the consequences of the repudiation of the said agreement by the company.

This bill, which was filed against *Colman* (the vice chairman and director), *Bates* (the managing director) and



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and the representative of *Husler*, prayed that *Colman* and *Bates* might indemnify the Plaintiff from all liabilities cast upon them in respect of the preference shares allotted in part payment of the contract works, contrary to the true intent and meaning of the agreement, contained in *Bates'* letter of the 25th of *June*, 1851, and the resolution of the directors of the 5th of *September*, 1851.

That they might, so far as the same was now practicable, specifically perform the agreement, and pay to the Plaintiff the total amount of the calls which had been paid by him in respect of the preference shares, the Plaintiff offering to deliver to the Defendants an equal amount of preference shares.

*Mr. Selwyn* and *Mr. Begbie* in support of *Colman's* demurrer, and

*Mr. Lloyd* and *Mr. Surrage* in support of *Bates'* demurrer, argued, that on the statements in the bill, the Plaintiff was entitled to no equitable relief, and that if the Defendants had incurred any responsibility by contract or by their conduct, the Plaintiff's only remedy was in a Court of Law for damages.

*Mr. R. Palmer* and *Mr. C. Hall*, in support of the bill, argued that if all the statements of the bill were admitted to be true, the Plaintiff was entitled to relief in this Court, and that if the Defendants entered into the contract without authority, they were personally liable to perform it, and also to indemnify the Plaintiff. That at all events, equity would order the Defendants to make good their representations, upon the faith of which the Plaintiff had acted and had incurred great losses.

The

The following cases were cited :—*Stainbank v. Fernley* (a); *Burnes v. Pennell* (b); *Bell's Case* (c); *Holt's Case* (d); *Blake v. Mowatt* (e); *Ex parte Morgan* (f); *Bennett's Case* (g); *Smout v. Ilbery* (h); *Ernest v. Nicholls* (i); *Polhill v. Walter* (k); *Cridland v. Lord de Mauley* (l); *Gibson v. D'Este* (m).

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The view I take of the case is this :—I assent to the principle of the Plaintiff's argument, but not to its application.

The bill is peculiar, it makes a distinction between the company and the directors for some purposes, and it unites them for others.

I will first consider the case as regards the company. The company is not sought to be affected by this bill, and is not a party to it, yet the first misrepresentation as to the preference shares is stated to have been advertised by the company. It is impossible that any one could suppose that the *Government Loan Commissioners* should have required shares to be issued nominally at 5*l.* each, but really at 3*l.*, as an inducement for them to advance the 40,000*l.*, or that any agreement to make the 5*l.* shares 3*l.* shares would be legal as between the company and the commissioners. But this is stated to have been a representation made by the company.

The bill then states, that the solicitor of the company prepared

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|-------------------------------------------------------------|---------------------------------------|
| (a) 9 <i>Sim.</i> 556.                                      | <i>Mac. &amp; Gor.</i> 294.           |
| (b) 2 <i>H. of L. Cas.</i> 522.                             | (h) 10 <i>Mec. &amp; W.</i> 1.        |
| (c) 22 <i>Beav.</i> 35.                                     | (i) 6 <i>H. of L. Cas.</i> 401.       |
| (d) 22 <i>Beav.</i> 48.                                     | (k) 3 <i>Barn. &amp; Adol.</i> 114.   |
| (e) 21 <i>Beav.</i> 603 (since reversed by House of Lords). | (l) 1 <i>De G. &amp; Sm.</i> 459.     |
| (f) 1 <i>Mac. &amp; Gor.</i> 225.                           | (m) 2 <i>Y. &amp; C. (C. C.)</i> 542; |
| (g) 18 <i>Beav.</i> 339; 5 <i>De G.</i> ,                   | 1 <i>H. of L. Cas.</i> 605.           |

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prepared the contract between the company and Messrs. *Ellis* and *Husler*, and although they had agreed to take shares at 3*l.* each, yet that the contract made them liable for 5*l.* per share. It is however clear from the authorities, that as regards the company, the Plaintiff, if he subscribed for 5*l.* shares, would be liable to that extent, and that his liability to the company would not be limited to 3*l.* a share. These observations dispose of the question as to the representation made by the company.

Then comes the question as to the representations made by the directors, and their liability, apart and distinct from that of the company. If the Defendants are liable in equity, it must be either for the specific performance of some contract which they have entered into, or it must be founded on their liability to make good their representations, upon the faith of which Messrs. *Ellis* and *Husler* have acted. If the Plaintiff is not entitled to relief in one of these forms, he has no case for the interposition of this Court, but his remedy, if any, must be by action at law.

I should observe, in the first place, that where, upon demurrer, a bill contains general and specific allegations, I have always held (following the rule, that every pleading must be taken most strongly against the pleader), that the general allegations must be referred to the particular and specific allegations contained in the bill with respect to the same matter, that is, *in eâdem materiâ*. This was laid down in *Frietas v. Dos Santos* (a), where a bill seeking to transfer the jurisdiction from law to equity, on the ground of complicated accounts, alleged, in general terms, that the

(a) 1 *You. & Jer.* 574.

the Plaintiff "had frequently been employed as agents to the Defendants, who resided abroad, and that they had various dealings and transactions, and that mutual accounts subsisted between them," but it specified only one transaction. The Court rejected the general charge as too loose and vague, and, treating the transactions between the parties as limited to the one specified, allowed a demurrer to the bill. I am therefore of opinion with respect to the general allegations contained in the 16th and 33rd paragraphs of the bill, that they must be referred to the specific allegations of the same nature which are stated in it.

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By the sixteenth paragraph the Plaintiff alleges, first, that the letter and resolution amounted to an express agreement by *Colvin* and *Bates* "on the part of the company;" and, secondly, that the Defendant, by joining in the resolution and otherwise representing "to the contractors, induced them to believe, &c." This means that the Defendant represented by joining in the resolution and otherwise; I must take these "other representations" to be those stated in other parts of the bill; and I cannot treat them as separate and distinct representations. The only others referred to are in paragraph thirty-three, which states that *Colman* and *Bates* were well aware that the company had no power to enter into the agreement contained in the letter and resolution, and that they were not authorized to enter into it, but they concealed the same from Plaintiff, and led him to believe that they were authorized by the company, and that the company had such power, and that it would be carried into effect by the company. Therefore this again refers to the same representation and agreement, that they asserted they had authority to make the agreement, and that it was to be carried into effect by the company.

I must

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I must, therefore, consider these representations for the purpose of determining the nature and extent of the liability of the Defendants which flow from them.

As to the letter, it was written by *Bates* alone, and only affects him; it is an engagement, on his part, to obtain a resolution of the board, undertaking either to receive the payment of the additional amount called up in preference shares, or exchange the 3*l.* shares for paid-up 5*l.* shares. This was complied with, and the resolution of the board was subsequently obtained.

As to the resolution, both *Bates* and *Colman* concurred in it, and, as the Plaintiff acted on the faith of it, I must determine what liability they have incurred by such concurrence. Assuming that the company had power to enter into such an arrangement, and that the board were duly authorized to make such a resolution, here is a distinct statement, that the board acceded to the proposition of indemnifying the Plaintiff and his partner from the payment, in cash, of future calls, that is, in the way pointed out in the letter.

The first question is, whether this assent by the board can be specifically performed by the Defendants. It is obvious that it cannot; it is an assent or engagement by the board that the company will do certain things, and it is so treated by the Plaintiff himself in the bill. The sixteenth paragraph represents the assent or engagement as made "on the part of the company."

The directors had no power to accept shares in payment of calls, or to exchange 3*l.* shares for paid-up 5*l.* shares; the company alone could do it, and the Plaintiff himself says the company had no such power. This Court could not enforce a part of a contract; if at all, it must be performed altogether, and what the board undertook

undertook to do is a thing which cannot be done. Even if I made a direction for specific performance, how could I enforce it? The decree would be, that the company "accept a proportion of such shares in payment of calls, in case they should hereafter be made." It is impossible to compel the company to do this. The directors may have incurred a liability, but the Plaintiff's remedy is not by specific performance.

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The same observation applies to the compelling them to make good their words; it is only another form of specific performance. They have not the means of doing it; it would be illegal. Assuming all this to have occurred, the Plaintiff to have suffered wrong, and the Defendants to have incurred liability, it is not in the form of specific performance, or by enforcing the rule or doctrine of equity, which compels a person to make good the words he has uttered and the statements he has made, that relief can be given in this case. The Court will compel persons to make good their words where it is possible; but in this state of the case the Court is not able to do this, because the things promised to be done cannot be enforced or permitted. It is obvious, that the proper relief would be by action at law, for the purpose of compelling the directors to make good the loss that the Plaintiff has sustained by their representations.

I am of opinion, that the Plaintiff has not made out such a case as, on the admission of the facts stated in the bill, entitles him to any decree.

Allow the demurrers.

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MILLAR v. ELWIN.

July 1.

A Plaintiff advertized that he would move to take the bill *pro confesso* at the end of six weeks. The notice was advertized once in every one of the first four weeks, but not in the two last. *Held*, that this was a sufficient compliance with the exigency of the 79th General Order of *May*, 1845.

THE 79th General Order of *May*, 1845 (*a*), thus prescribes the mode in which a bill may be taken *pro confesso* :—

The Plaintiff may cause to be inserted in the *London Gazette* a notice, that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the *London Gazette*), the Court will be moved, that the bill may be taken *pro confesso*. The Plaintiff upon the hearing of such motion is to satisfy the Court "that such notice of motion has been inserted in the *London Gazette*, at least once in every week from the time of the first insertion thereof up to the time for which the said notice was given." The Court may then order the bill to be taken *pro confesso*.

Notices were inserted in the *Gazette* on the 28th of *May*, the 4th of *June*, the 11th of *June*, and the 18th of *June*, that the Plaintiff would move to take the bill *pro confesso* on the 1st of *July*. No such notice was inserted between the 18th of *June* and the 1st of *July*.

Mr. *Shebbeare*, in support of the motion, argued, that although the notice had not literally been inserted once in every week between the 28th of *May* and the 1st of *July*, yet that the four notices were sufficient; for the order only required four weeks to intervene between the first notice and the day of making the motion. He cited *Bazalgette v. Lowe* (*b*).

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I think the advertisements sufficient under this Order.

(*a*) *Ordines Canc.* 313.(*b*) 24 *Law J. (Ch.)* 368—416.

AN
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TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ABANDONED MOTION.

1. Where the Plaintiff, after answer, gave notice of motion for a Receiver, but filed no affidavits, and he ultimately abandoned it, the question of whether the Defendant is entitled to more than 40*s.* costs depends on whether the Plaintiff has given notice to use the answer. *Semble. Gorely v. Gorely.*

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2. Where, on a notice of motion, no affidavit has been filed, it may be abandoned on payment of 40*s.* costs, although the motion has, on a former occasion, been reserved. *Ibid.*

ABSOLUTE INTEREST.

1. Bequest of 1,000*l.* to a married woman for her own use, nevertheless, during her life, to pay the dividends, during her life, for her

separate use, independent of any husband. Held, an absolute interest. *Gurney v. Goggs.*

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2. Appointment to *A. B.* (an object of a power), to be settled for her separate use, and to be divided, at her death, amongst her children. The gift to the children being void, they not being objects. Held, that *A. B.* took for life only, and not an absolute interest ineffectually attempted to be cut down. *Reid v. Reid.*

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3. A testator devised real and personal estate to *A.* for life, with a direction to the executors, after *A.*'s death, to divide it amongst all her children and their lawful issue, share and share alike. There was a gift over of the leaseholds to other persons on a total failure of issue of the children. Held, that

Y Y

the children took estates in tail in the realty, and absolute interest in the personalty, and that cross remainders were not to be implied in regard to the leaseholds. *Beaver v. Nowel*. Page 551

See APPOINTMENT, 1, 2.

"OR" READ "AND."

ACCELERATION.

An appointment was made to a person not an object of a power, with remainder to an object. The first appointment being void, it was held, that the second was not accelerated, but failed with the first. *Reid v. Reid*. 469

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ACCOUNT.

See DIRECTOR, 2.

HUSBAND AND WIFE.

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ACCRUER.

1. Bequest to four equally, "and as each dies, his or her part shall be equally divided amongst the others that's living." Held, that the accrued shares did not go over. *Goodwin v. Finlayson*. 65

2. The word "share" alone, when there is no gift over of the whole fund, in case of the failure of all the members of the class, is not sufficient to carry over an accrued share. *Evans v. Evans*. 81

ACQUIESCENCE.

See BREACH OF TRUST, 1, 2, 3, 5.

ACTION AT LAW.

See ESTOPPEL.

ADDITIONAL LEGACY.

1. Gift of a share "in addition," held, under the circumstances, not liable to the same contingency as the original share. *King v. Tootel*. Page 23

2. A testator devised an estate to A. and B. successively for life, and after their deaths, to sell and divide the produce between his grandchildren who should be living at the decease of the survivor of A. and B., except his grandsons *Edward* and *John*, neither of whom was to receive anything; and he directed that the shares, which would be otherwise payable to them, should be paid to his granddaughter *Susannah*, "in addition to her own share." *Edward* and *John* survived the tenants for life, but *Susannah* predeceased them. Held, that the two shares passed to the representatives of *Susannah*. *Ibid*.

AFFIDAVIT.

Affidavits held inadmissible to control the operation of a deed. *Comlishaw v. Hardy*. 169

See ABANDONED MOTION, 1.

PAYMENT OUT OF COURT.

AGENT.

See VENDOR AND PURCHASER, 4, 5.

AGREEMENT.

See CONTRACT.

PARTNER, 2.

SPECIFIC PERFORMANCE.

ALTERNATIVE GIFT.

1. Effect given to a gift over in one of two alternatives which happened,

though the other was too remote. Thus upon a bequest to trustees for *A.* for life, and after her decease to divide between her children when they should attain twenty-seven, and in the event of *A.* not leaving any child at her death, then over. *A.* had no issue, it was held, that the gift over took effect. *Cambridge v. Rous.* Page 409

ANNUITY.

Bequest of an annuity or rent-charge to *A.* for life, and after her decease, unto her children equally, to be applied in their maintenance until the youngest attained twenty-one, and then to be sold and the produce divided amongst them. Real estates were then devised to *B.* charged with the annuity. Held, that the rent-charge was perpetual and not for life. *Mansergh v. Campbell.* 544
See MARSHALLING.

ANTICIPATION.

See DOMICILE, 1.

APPEARANCE.

See RECEIVER.

APPOINTMENT.

1. A testatrix had ground rents of her own, and ground rents of which, under the will of her husband, she was tenant for life with power to appoint to her children. By her will, she gave a son an annuity, payable "out of my ground rents." The Court having held, on another clause of her will, that "my property" included the husband's

also, came to the conclusion, that "my ground rents" also included the husband's. *Reid v. Reid.*

Page 469

2. A testatrix having property of her own, and a power to appoint to her children other property of which she was tenant for life, gave "the whole of the residue of her property" &c., ("except her freehold property" disposed of by a contemporaneous codicil,) to *A.* The excepted freehold property was part of the subject of the power. Held, in consequence of the exception, that the residue of the property subject to the power passed. *Ibid.*
3. Money in Court stood limited to a widow for life, and afterwards as she should by deed or will appoint. The Court directed payment to her, without requiring an appointment. *Cambridge v. Rouse.* (No. 2.) 574

See ABSOLUTE INTEREST, 2.

LIS PENDENS, 3.

POWER.

ASSIGNMENT.

See BANKRUPT, 2.

ATTORNEY GENERAL.

Power of the Attorney-General to sanction a compromise in charity cases. *Attorney-General v. Boucherell.* 116

BANKRUPT.

1. A Scotch firm had a branch in London. Y Y 2

don, which was wholly conducted by an agent and manager at a salary, but in their name. By contract, he was to have a lien on goods consigned to him for bills accepted by him for the firm. The firm became bankrupt in *Scotland*. Held, that the goods under the manager's control at the time were within the "order and disposition" of the bankrupts, and passed to their assignees unaffected by his lien. *Hoggard v. Mackenzie*. Page 493

2. *A.* and *B.* carried on partnership; *A.* died, and a considerable sum was due from the partnership to his estate. *B.* continued the trade, with the assent of the executors, but at the end of six months, they insisted on payment, or to have the business wound up, whereupon *B.* assigned to them his share in all the partnership assets, upon trust to pay the joint creditors, and then the debt due to *A.*'s estate, and the residue to *B.* Held, upon *B.*'s subsequent bankruptcy, that the assignment was not an act of bankruptcy. Held also, that the executors had no lien on the stock in trade substituted by *B.* for that sold during the six months. *Payne v. Hornby*. 280

See FRAUDULENT PREFERENCE.
PLEADING, 1.

BEQUEST.

1. A testator, who had lent money to his son *John*, bequeathed his residuary estate to *John* and his other children equally for life, with re-

mainder over to their children, and he declared, that neither of his children should receive anything until they should have accounted for any sum lent by him to them. The testator afterwards agreed to accept a composition on his debt, but which was not paid at his death. *Seem*, that the son was only liable to account for the composition; but held, that the son's debt was not to be deducted from his children's interest. *Silverside v. Silverside*. Page 340

2. By his will, the testator divided his property between his son and two married daughters, and he declared, that the debts due to him from his son and his two sons in law should be "paid or accounted for to his executors," before his children should receive any part of his estate. By a codicil, he cut down his son's interest to a life estate, and gave interests in share to his wife and children. Held, that the son was not bound to pay his debts for the benefit of his wife and children, but only to bring the amount into hotchpot as regarded his two sisters. *White v. Turner*. 505

See ABSOLUTE INTEREST.

ALTERNATIVE GIFT.

CROSS REMAINDERS.

FORFEITURE.

LEGACY.

PATRONAGE.

SUBSTITUTIONAL GIFT.

SURVIVORSHIP.

VESTING.

WILL, and its references.

BILL OF REVIVOR.

See PLEADING, 2.

BOND.

See BROKER.

BREACH OF TRUST.

1. The Plaintiff, a *feme covert*, was, from the death of her father in 1839, entitled to maintenance out of his estate, and to a share of the residue in 1854, when her youngest brother attained twenty-five. In 1843, the executors, in breach of trust, and without her previous knowledge, invested the residue in railway securities, and a considerable loss occurred. The Plaintiff soon after the investment heard of it, and complained of it in 1850, but took no proceedings until 1855, after the death of her uncle, an executor, from whom she had expectations, and whom she was unwilling to displease. Held, that she was not bound by laches or concurrence. *Davies v. Hodgson*. Page 177
2. A *cestui que trust*, having, with knowledge, received the income from an improper investment, was held bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund. *Ibid*.
3. The Court will not visit a trustee with the consequences of a breach of trust committed with the sanction or by the desire of the *cestui que trust* or of one committed without such sanction or desire, if,

when it comes to the knowledge of the *cestui que trust*, he has acquiesced in and obtained the benefit of it for a long period. *Griffiths v. Porter*. Page 236

4. Two trustees, *A.* and *B.*, joined in the receipt of trust money. *A.* allowed *B.* to retain the cheque for money, which, against the remonstrances of *A.*, he placed in the hands of a solicitor to invest on mortgage, and it was lost. Held, that both were liable. *Ibid*.
5. Two trustees, *A.* and *B.*, had allowed trust money to be received by their solicitors. The *cestui que trust* authorized its investment on a mortgage by *B.* alone. The money being in danger and the solicitors pressed, a mortgage was given, but as to which *B.* exercised no judgment, and it turned out insufficient. Held, that both trustees were liable for the loss. *Ibid*.

See FEME COVERT.

RECOUPING.

REFUNDING.

TRUSTEE.

BROKER.

A bond was given by a broker to the Corporation of *London*, to secure the due performance of his duties. He made default. Held, on his death, that the corporation held the amount recovered on the bond as equitable assets, and in trust for the general body of his creditors, and not exclusively for those who had suffered by his defaults. *Nash v. Bryant*. 533

CANAL.

See RAILWAY, 1.

CHAPEL.

The rebuilding of a dissenting chapel was entrusted to three of the several trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the title deeds of the chapel, 500*l.*, which they personally engaged to pay. Interest was, for a long time, paid out of the chapel funds, but ultimately, the representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees. Held, that the representatives of the persons who had paid the 500*l.* had a lien on the deeds, but that they were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would be altogether destroyed. *Darke v. Williamson.*

Page 622

CHARITY.

1. Observations as to the jurisdiction and authority of the Court to alter or modify charitable trusts. *Attorney-General v. Boucherett.*

116

2. When the founder of a charity commits the administration of it to a man and his heirs, this Court cannot interfere with their discretion, so long as they perform their trust properly. *Ibid.*

3. In charity informations, where the case is doubtful, the Attorney-General should require a relator to be named to be answerable for

the costs, even in cases certified by the Charity Commissioners. *Attorney-General v. Boucherett.*

Page 116

4. The sanction of the Charity Commissioners is not necessary to enable a trustee of a charity fund to pay it into Court under the Trustee Relief Act, and when paid in, this Court may proceed to deal with it and direct a scheme, without the certificate of the Commissioners. *Re The St. Giles and St. George, Bloomsbury, Volunteer Corps.*

313

See MORTMAIN.

SCHOOL.

SCHOOLMASTER.

CHARITY COMMISSIONERS.

See CHARITY, 4.

CHILDREN.

See HEIRS.

CHURCH.

See PATRONAGE.

CHURCH OF ENGLAND

SCHOOL.

See SCHOOL.

CLASS.

Under a bequest in trust for all the sons and daughters of *A.*, *B.* and *C.* (who were living) who shall attain twenty-one, it was held, that the class was not to be ascertained on the first of the class attaining twenty-one, in consequence of the will containing a power of maintenance and advancement, whether they "shall or not" have attained

twenty-one, and notwithstanding the liability of the share to be lessened by the subsequent addition to the class entitled to the entire fund. *Iredell v. Iredell*. (No. 2.)
Page 485

See NEXT OF KIN.

CO-DEFENDANTS.

Declaration of rights, as between co-Defendants, refused. *Thomas v. Lloyd*.
620

CODICIL.

See PAYMENT.

COMPANY.

See CONTRIBUTORY.

DIRECTOR.

MISREPRESENTATION.

CONDITION.

See BEQUEST.

CONDITIONS OF SALE.

1. Conditions of sale must be construed strictly against the person who frames them. *Greaves v. Wilson*.
290
2. A condition, that the vendor shall be at liberty to rescind the contract, if the purchaser should "shew any objection of title, conveyance or otherwise, and should insist thereon:" was held, not to authorize the vendor to rescind the contract, without attempting to answer the requisitions, although some of them were untenable; held also, that he was bound to answer them, and give the purchaser an opportunity of either

waiving or insisting upon them. *Greaves v. Wilson*.
Page 290

3. The vendor, notwithstanding such a condition, was held bound to comply with a requisition, that a mortgagee of the property, by underlease, should be paid off and concur in the conveyance. *Ibid*.

CONSTRUCTION.

See COPYHOLD.

COVENANT.

DOMICIL, 3.

ELDEST SON.

PARTNER, 2.

RESIDUE.

WILL, and its references.

CONTINGENT ESTATE.

1. There is no case in which the contingent estate of a remainderman has been accelerated, for the purpose of giving him a right to rent accrued prior to the time when his estate took effect. Where, therefore, an estate was limited to the children of A., born within fifteen years, with remainder to the Plaintiff, and A. had no child, and the fifteen years had not expired, it was held, that the Plaintiff had no right to the present rents. *Sidney v. Wilmer*.
260
2. An estate was devised to trustees for 500 years, with remainder to persons still unborn, with remainder to the Plaintiff. The trustees had active duties as to the management of the estate and large discretionary powers, and they were authorized, "during the minority of any person abso-

lutely or presumptively entitled," to apply the surplus income for the benefit of such person, accumulating the surplus. Held, that the Plaintiff, who had attained her majority, had no right to any part of the surplus rents accruing prior to her estate becoming vested in possession. *Sydney v. Wilmer*.

Page 260

CONTRIBUTORY.

1. Where a person takes shares in a company through false representations, he will not be placed on the list of contributories if the misrepresentations be made by the company, but he will, if they be made by a third person. *Ayre's case. In re The Deposit and General Life Assurance Company*. 513
2. A person was induced to take shares in a company (insolvent at the time) by the false statements contained in the report of the directors, and the erroneous accounts submitted by them to the general meeting. Having discovered the company to be insolvent, he repudiated the shares. Held, that he was not a contributory. *Ibid.*
See ESTOPPEL.

MISREPRESENTATION.

CONTRACT.

1. *A.*, by contract in writing, agreed with *B.* to take a lease of "those two seams of coal known as 'the two-feet coal' and the 'three-feet coal,' lying under lands hereafter to be defined in the *Bank End Estate*," and *B.* agreed to let to *A.* "the before-mentioned seams of

coal." Held, that the contract was sufficiently definite to enforce, and that the true construction of it was, that the boundaries of the estate, which consisted of about twenty-seven acres, were to be thereafter defined. *Hayward v. Cope*.

Page 140

2. A draft lease was prepared by the lessor in pursuance of a written contract, which was not objected to by the lessee, who afterwards refused to complete. Held, that the draft lease could not be used for the purpose of controlling or explaining the contract itself.

Ibid.

3. *A.* agreed to sell an estate to *B.* for 3000*l.*, "and the further sum of 20 per cent. on any sum the property might realize above that sum at the sale by auction advertised to take place" the next day. *B.* withdrew the estate from the sale. Held, that the contract was sufficiently certain, and might be enforced. *Langstaff v. Nicholson*.

160

CONVEYANCE.

In conveyances subsequent to the 26th of *April*, 1855, to purchasers and mortgagees of lands, tenements and hereditaments, which are mortgaged, the judgment creditors of the mortgagees of the property, who are paid off prior to or at the time of the execution of the conveyance, need not concur. *Greaves v. Wilson*. (No. 2.) 434

COPYHOLD.

1. The vendor of a copyhold estate

enfranchised under "The Copyhold Act, 1852," is not bound to shew the lord's title. *Kerr v. Pawson*. Page 394

2. After the passing of "The Copyhold Act, 1841," and "The Copyhold Act, 1852," but before "The Copyhold Act, 1858," an agreement was entered into for the sale of a copyhold estate, together with the timber "and all appurtenances to the same hereditaments belonging," as soon as the same should become freehold, under an agreement of the vendor to use his best endeavours to enfranchise. An enfranchisement was effected under the second act, reserving the minerals to the lord. Held, that the contract had reference to the provisions in those acts relative to minerals, &c., and that the purchaser must complete, notwithstanding this reservation. *Ibid*.

CORONER'S INQUEST.

See EVIDENCE, 1.

COSTS.

1. Costs out of the estate directed to be paid to the Plaintiff, who wholly failed in her suit, the trustee, who was a Defendant, having asked for a direction as to the construction of the will. *Merlin v. Blgrave*. 125
2. A bill was filed for the administration of the real and personal estate. A part of the real estate was specifically devised, and gave rise to questions of construction; other part was devised to charities,

which devise was void under the Statute of Mortmain. The residuary real estate descended on the heir and the residuary personal estate was undisposed of, and went to the next of kin. Held, that the costs of suit attributable to the administration of the trust of the real estate were payable out of the descended estates, and that those relating to the execution of the trusts of the personal estate out of the residuary personal estate. *Sanders v. Miller*. Page 154

3. The costs of Defendants dismissed pending the suit, on their being ascertained to be purchasers for value without notice, were ordered, at the hearing, to be paid by the principal Defendants. *Hughes v. Howard*. 575

See ABANDONED MOTION.

REFORMING DEED, 1.

TRUSTEE RELIEF ACT.

COVENANT.

Covenant by *A.* to bequeath to *B.*, by will, "one full fourth part of the real and personal estate whatsoever of or to which *A.*" should, at the time of his death, be entitled, and in default, that his heirs and executors should, immediately after his death, convey "one full fourth part" of it. Held, upon the context, to mean one-fourth in value, and not one undivided fourth of every item of property *in specie*. *Bell v. Clarke*. 437
See COVENANT TO SETTLE.

COVENANT TO SETTLE.

A husband covenanted to settle the

share of his wife and of himself "in her right" in the stocks comprised in her great uncle's will. Under the will, the fund was limited to the husband, in case of his surviving his wife and her father and of there being no issue. Held, that the husband's interest was not comprised in his covenant. *Ibbetson v. Grote*. Page 17

CREDITORS' DEED.

See PARTIES, 1.

CROSS-REMAINDERS.

A testator devised real and personal estate to A. for life, with a direction to the executors, after A.'s death, to divide it amongst all her "children and their lawful issue, share and share alike." There was a gift over of the leaseholds to other persons on a total failure of issue of the children. Held, that the children took estates tail in the realty and absolute interest in the personalty, and that cross-remainders were not to be implied in regard to the leaseholds. *Beuter v. Nowell*. 551

CY-PRES.

1. The doctrine of *cy-pres* is not to be extended. *Hale v. Prew*. 355
2. The *cy-pres* doctrine is inapplicable when the limitation to unborn children gives them a fee. *Ibid.*

DE BENE ESSE.

See EVIDENCE.

DEBT.

See BEQUEST.

DECREE.

See EVIDENCE, 2.

PARTIES, 3.

DELAY.

See LACHES.

DEMONSTRATIVE LEGACY.

See SPECIFIC LEGACY.

DEMURRER.

See HUSBAND AND WIFE.

DEVISE.

A testator "gave, devised and bequeathed" his household goods, &c., "and everything he should die possessed of," to A. for life, and after her death, he "gave, devised and bequeathed the whole of his effects which might be then remaining unto and to the use of" the Plaintiff. Held, that the real estate passed. *Phillips v. Beal*. Page 25

See ABSOLUTE INTEREST.

CONTINGENT ESTATE, 1, 2.

CROSS REMAINDERS.

ESTATE TAIL.

HEIRS.

MAINTENANCE.

WILL, and its references.

DIRECTOR.

1. The directors of a company are trustees, and they have attached to them, for the benefit of the shareholders, all the liability and duties which attach to a trustee and agent. If, therefore, a di-

rector enter into a contract for the company, he can derive no personal benefit from it. *The Great Luxembourg Railway Company v. Sir William Magnay.* (No. 2.)

Page 586

2. A railway company furnished a director with a large sum of money, to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it. Held, that the transaction could not stand, but that the company must adopt or repudiate the transaction altogether; and the company having sold the concession pending a suit impeaching the transaction: Held also, that they could have no relief, either as to the application of the money or otherwise. *Ibid.*

See CONTRIBUTORY.

MISREPRESENTATION.

DISCRETION.

See CHARITY, 2.

DISSENTING CHAPEL.

See CHAPEL.

DISSENTERS.

See SCHOOL.

DISSOLUTION.

See PARTNERSHIP.

DOMICIL.

1. A testator bequeathed personal estate in trust for the separate use of a *feme covert*, and without power

of anticipation. The legatee was, at the date of the will, domiciled abroad, and had continued so ever since. By the law of her domicile, the restraint against anticipation was disregarded, but this Court, nevertheless, refused to give effect to a beneficial arrangement made by her anticipating her income.

Peillon v. Brooking. Page 218

2. A *feme covert*, living apart from her husband, has no power to change her domicile. *Re Daly's Settlement.* 456

3. A *feme covert* had a power to appoint by her will, "notwithstanding her coverture, and as if she were sole and unmarried." She lived in *France* thirty years, apart from her husband, who was domiciled in *England*. Held, that her will, which was valid, in respect of formalities, by the French law, but invalid as regarded the English law, was not a due execution of the power. *Ibid.*

DOUBLE AGENCY.

See VENDOR AND PURCHASER, 4, 5.

ELDEST SON.

1. *A. B.*, on his marriage, settled real estates on himself for life, then to trustees for a term to raise portions for his younger children, and subject thereto, to his first and other sons in tail. The portions were to vest in sons at twenty-one, but to be payable after the decease of the husband and

wife. *George*, the second son, attained twenty-one, after which *William*, the eldest son, having barred the entail, died without issue, and, subsequently, the portions became payable. Held, that *George*, though the eldest at the period of distribution, was entitled to a share of portions for younger children. *Adams v. Beck*.

Page 648

2. The character of "eldest son" is, in ordinary cases, to be ascertained at the period of vesting, and not of payment. *Adams v. Adams*. 652
3. Bequest to *A.* for life, and afterwards in trust for her children who, not being an eldest or only son, should attain twenty-one. In 1854, after *George*, the second son, had attained twenty-one, the eldest son died, and the second thereupon became eldest. The tenant for life died in 1857. Held, that *George*, though an eldest son at the time the fund became payable to the children, took a share. *Ibid*.
4. Under a trust for *A.* for life, "and after her decease, to be divided equally between her younger children." Held, first, that the children took vested interests at their births; and, secondly, that the character of "younger child" was to be determined at the period of vesting, and not that of distribution. *Adams v. Robarts*. 658

ELECTION.

A testator, whose only funded property consisted of a sum of Long Annuities, which had been pur-

chased by him in the joint names of himself and wife, bequeathed to his brothers an interest in "his present funded Stock or government securities." He also made a provision for his wife. Held, that the wife was put to her election in regard to the Long Annuities. *Grosvenor v. Durston*. Page 97

EQUITABLE ASSETS.

See *BROKER*.

ESCAPE.

See *SHERIFF*.

ESCHEAT.

See *ESTATE PUR AUTRE VIE*.

ESTATE PUR AUTRE VIE.

A leasehold for lives, limited to one and his heirs, was devised to trustees in trust for *A.* and his heirs. *A.* died intestate and without heirs. Held, that the leaseholds *pur autre vie*, passed under the 6th section of the Wills Act to *A.*'s administrator, and did not belong to the trustees. *Reynolds v. Wright*. 100

ESTATE TAIL.

A testator devised real and personal estate to *A.* for life, with a direction to the executors, after *A.*'s death, to divide it amongst all her children "and their lawful issue, share and share alike." There was a gift over of the leaseholds to other persons on a total failure of issue of the children. Held, that the children took estates tail in the realty and absolute interest

in the personalty, and that cross-remainders were not to be implied in regard to the leaseholds. *Beaver v. Nowell*. Page 551

ESTOPPEL.

In an action at law for calls by a company against a shareholder, he pleaded fraud, but the company obtained a verdict. The company having afterwards been ordered to be wound up: Held, that the verdict did not prevent the shareholder insisting that he was not a contributory, he having been induced to take the shares through the fraudulent misrepresentations of the company. Having proved his case here, the Court, notwithstanding the verdict, refused to place him on the list of contributories. *Ayre's Case, In re The Deposit and General Life Assurance Company*. 513

EVIDENCE.

1. The finding of a jury or a coroner's inquest held to throw the burthen of proof in a civil case on the party alleging the contrary. *The Prince of Wales, &c., Assurance Company v. Palmer*. 605
2. It is not proper to enter, in a decree, evidence as "read *de bene esse*, saving just exceptions." If its admissibility be disputed, the point should be determined by the Court. *Drake v. Drake*. (No. 1.) 641

See LIEN.

PAYMENT OUT OF COURT.

PRESUMPTION.

PRIVILEGE.

See PRODUCTION.
WITNESS.

EXECUTOR.

See GOOD-WILL.

EXTRINSIC EVIDENCE.

See AFFIDAVIT.

CONTRACT, 2.

FEME COVERT.

Whether a *feme covert* can, in respect of her separate estate, consent to a breach of trust, *quære?* *Davies v. Hodgson*. Page 177

See BREACH OF TRUST, 1.

DOMICIL.

HUSBAND AND WIFE.

FORECLOSURE.

See CHAPEL.

MORTGAGE.

RAILWAY, 2.

FORFEITURE.

Bequest to *A.* for life, and afterwards to her children living at her death, with a proviso, that if any child "should acquire a vested interest," and should encumber the same before his share should become payable, it should not be paid to him or his incumbrancer, but to others. A child mortgaged his share in the life of *A.*, and survived her. Held, that the forfeiture took effect. *In re Payne*. 556

See MARRIAGE WITH CONSENT.

MORTGAGE, 6.

POLICY, 3.

FRAUD.*See* POLICY, 2.

POWER, 1, 2, 3, 6.

FRAUDULENT PREFERENCE.

1. Remarks on the doctrine of fraudulent preference. *Johnson v. Fessenmeyer.* Page 88
2. If a trader, on the eve of bankruptcy, yielding to the *bond fide* pressure of a creditor, give him a security on part of his property, this is not a fraudulent preference, although both parties may be aware of the impending bankruptcy; but if the debtor, even on pressure, assign the whole of his property to a creditor, so as to disable him from continuing to carry on his business, this is a fraudulent preference and invalid against the other creditors upon a bankruptcy. The same result follows, where an exception from the whole property assigned is merely colorable. *Ibid.*
3. The case of *Stanger v. Wilkins*, 19 *Beav.* 626, explained. *Ibid.*

FURTHER ADVANCES.

Where a first mortgage extends to future advances, further advances made by the first mortgagee, after notice of second mortgage, have no priority over the latter. *Rolt v. Hopkinson.* 461

GENERAL ORDERS.*See* ABANDONED MOTION.

TAXATION, 3.

PRO CONFESSO.

GOOD-WILL.

1. There is no equity to prevent a surviving partner or clerk who is appointed executor from continuing the same trade, and a purchaser of the testator's good-will must take subject to the chance of obtaining the customers of the old establishment. *Davies v. Hodgson.*

Page 177

2. The good-will of a tobacco broker, whose brother had been actively engaged in the business and survived him, and continued the business, held to be valueless. *Ibid.*

GRANDCHILD.*See* POWER, 8.**HEIRS.**

Devise of freeholds to six persons, equally, for life, and after the death of the survivor to sell, "and the money to be equally divided amongst their several heirs." Held, that their children, and not their heirs at law, were intended. *Bull v. Comberbach.* 540

HUSBAND AND WIFE.

Husband and wife had, for many years, lived and were still living separate. The husband remitted money for her maintenance and support. She saved a considerable portion. Held, that the husband could not recover back these savings, and a demurrer to a bill

by the husband against his wife and her bankers for that object was allowed. *Brooke v. Brooke*.

Page 342

See COVENANT TO SETTLE.

DOMICIL.

FEME COVERT.

PAYMENT OUT OF COURT.

IMPLIED GIFT.

See POWER, 5.

INJUNCTION.

To entitle a Plaintiff to an injunction to restrain proceedings at law, he must himself verify the allegations in his bill, and shew, by affidavit, that the discovery required is material. *Mollett v. Enequist*. 609
See VENDOR AND PURCHASER.

INSURANCE.

See PARTIES, 3.

POLICY.

SHIP.

IRREGULARITY.

See TAXATION, 1.

ISSUE.

1. Gift to "issue" after the death of a tenant for life, held to include issue of every degree. *Maddock v. Legg*. 531
2. Bequest to persons for life, and after their deaths, "unto their and each of their issue, and the survivor or the survivors of them, on their severally attaining twenty-

one, in equal proportions." On the death of the last tenant for life, there were three generations of issue living. Held, that all who survived and attained twenty-one participated in the fund. *Maddock v. Legg*. Page 531

3. A testator bequeathed his residue equally to his five cousins who should be living at the time of his decease, and to the "issue" of such of them as should be then dead leaving issue, share and share alike, "such issue, respectively, nevertheless, taking between them a parent's share." Held, that the word "issue" was to be construed "children," and that grandchildren were excluded. *Smith v. Horsfall*.

628

See ABSOLUTE INTEREST, 3.

CROSS REMAINDERS.

ESTATE TAIL.

POWER, 8.

SUBSTITUTIONAL GIFT.

JUDGMENT.

See RAILWAY, 2.

JURISDICTION.

See CHARITY, 4.

LUNATIC.

POLICY, 1.

LACHES.

Parties claiming a portion of the residue held not barred, after

twenty years' delay, either by the statute or by laches, the fund still existing as a trust fund, and all parties having acted under a misconception of rights. *Downes v. Bullock*. Page 54
See BREACH OF TRUST, 1.

LEASEHOLD.

See ESTATE PUR AUTRE VIE.

LEASES AND SALES ACT.

Whether the Court can direct leases and sales under the 19 & 20 Vict. c. 120, in a cause without a petition, *quære?* *Harvey v. Clark*. 7

LEGACY.

A testator gave all his personal estate to his wife for life, and he bequeathed 40*l.* to *A. B.*, and other pecuniary legacies, all of which were payable at her death. By a first codicil, he gave a legacy of 200*l.* to *C. D.* (who was not mentioned in his will), and he directed that all things in his codicil should be performed as if the same were so declared in his will. By another codicil, he revoked the legacy of 40*l.* to *A. B.* and gave her 50*l.* Held, that the legacy of 200*l.* was payable at the death of the testator, but that the payment of the legacy of 50*l.* was postponed until the death of the widow. *Giesler v. Jones*. 418
See ACCRUE.

ADDITIONAL LEGACY, 1, 2.

LEGATEE.

LONG ANNUITIES.

SPECIFIC LEGACY.

See VESTING.

WILL, and its references.

LEGATEE.

1. A testator, by his will, gave *F. B.* 80*l.* per annum Long Annuities to the year 1860, and a "Deferred Annuity" of 80*l.* from Christmas, 1859. By a codicil (which did not mention *F. B.*'s name) he said, I direct that my executors "make my Long Annuities of 80*l.*, instead of 80*l.* be only 30*l.* per annum, and a *reversionary annuity* purchased on her life 30*l.*, as I have lately expended money on her account." Held, that *F. B.* was referred to, and that she was entitled to 30*l.* a year only. *Ellis v. Bartrum*. (No. 1.) Page 107
2. A testator bequeathed 19 guineas each to the "surgeon" and resident "apothecary" of the *S. Dispensary*, or any who might hold the like situation at his decease. There were two surgeons and no resident apothecary, but a "dispenser." Held, that the three were entitled to 19 guineas each. *Ibid.* (No. 2.) 109

See REFUNDING.

LEGITIMACY.

See PRESUMPTION.

LIEN.

1. A witness is bound to produce a document, in order that it may be given in evidence, notwithstanding he may have a lien on it. *In re The Cameron's Coalbrook, &c. Railway Company*. 1

2. A father, the equitable owner of a small bit of land, erected a granary thereon; he afterwards allowed his two sons to use and occupy them, and they erected other buildings thereon at a great expense. Held, under the circumstances stated by the father in his answer, that the sons had a lien on the premises for their outlay. *The Unity Joint-Stock Mutual Banking Association v. King.* Page 72

See BANKRUPT, 2.

SET-OFF, 1.

VENDOR AND PURCHASER, 4, 5.

LIFE INTEREST.

See ABSOLUTE INTEREST.

LIMITATION.

See CONTINGENT ESTATE, 1, 2.

LIS PENDENS.

1. Interests of Defendants *inter se*, arising out of the rights of the Plaintiffs, protected by the doctrine of *lis pendens*. *Tyler v. Thomas.* 47
2. In a suit instituted by creditors for the administration of the testator's estate, the deficiency of the personal estate for payment of the debts was payable out of two real estates devised separately to the Defendants *A.* and *B.* In 1846 the debts were ordered to be paid out of *A.*'s estate alone, without prejudice to his right of contribution against *B.*'s estate. In 1852, the suit was registered as a VOL. XXV.

lis pendens, and two months afterwards *B.* mortgaged his estate to *C.* who had no notice of *A.*'s rights. Held, that there was a *lis pendens* as regarded *A.*'s rights, and that *C.*'s mortgage must be postponed to *A.*'s claim. *Tyler v. Thomas.*

Page 47

3. In a suit to have an appointment, under a discretionary power, declared invalid, a subsequent appointment *pendente lite* upheld. *Ward v. Tyrrell.* 563

LONG ANNUITIES.

A share in Long Annuities held, upon the context, to pass under the words, "remaining sum or sums of money." *Grosvenor v. Dursdon.* 97

LUNATIC.

1. Jurisdiction of the Court to entertain a suit instituted in the name of a person of weak mind by a next friend. *Light v. Light.* 248
2. Decree made in such a suit for the protection of the Plaintiff's property, and liberty given to apply in lunacy as to its application. *Ibid.*

MAINTENANCE.

1. Devise to the children of *A.*, *B.* and *C.* who should be living when the youngest attained twenty-one, with a direction, that "the present yearly rents" should be paid
z z

to the persons who brought up the children of *C.* Held, upon the context, that until the contingency happened, the rents were to be paid to such persons in trust not only for the children of *C.* but of *A.* and *B.* *Sanders v. Miller.*

Page 154

2. Power of maintenance of "the person for the time being entitled" to the estate, held, to include persons "absolutely or presumptively entitled." *Sidney v. Wilmer.* 260
See CLASS.

MAKING GOOD REPRESENTATIONS.

Directors having entered into a contract, *ultra vires*, and which was not binding on the company, *Held*, that it could be neither specifically performed, nor could the Court order them to make good their representations. *Ellis v. Colman, Bates and Husler.* 662

MARRIAGE WITH CONSENT.

Bequest to trustees, in trust "to pay, assign and transfer" unto and between the children of *A. B.*, "when and as they should respectively attain the age of twenty-one years, or be married with the lawful consent of parents or guardians," with maintenance in the meantime. A child died under twenty-one, having married without any consent. Held, that her representative took no share in the property. *Gardiner v. Slater.* 509

MARSHALLING.

A testator bequeathed an annuity to his wife for life, and his residuary estate to his children. The executors set apart a fund to answer the annuity. Some of the children settled their shares in this fund, by specific description, and they afterwards incumbered the shares in the other residuary estate. By the reduction of the interest of the fund set apart, the capital of it was resorted to for payment of the annuity. Held, that the persons claiming under the settlement were not entitled, as against the incumbrancers of the residue, to have the annuity fund made good out of the residuary estate. *Wedderburn v. Wedderburn.* Page 113

MERGER.

See PRIORITY, 2.

MINE.

See TITLE.

MINERALS.

See COPYRIGHTS, 2.

MISREPRESENTATION.

A public company is not bound by the misrepresentation made by its manager or secretary without its sanction, who cannot be considered its agents to commit a fraud; but the company will be answerable for misrepresentations made in a report of the directors, sanctioned by a general meeting. *Ayre's case. In re Deposit and General Life Assurance Company.* 513

MIXED FUND.

A testator gave and devised to his executors his freehold house and all his other property he might die possessed of, "in trust for the purposes of his will." Held, that he had not created a mixed fund. *Ellis v. Bartrum*. (No. 3.)

Page 110

MORTGAGE.

1. A first mortgagee allowed the title deeds to remain in the possession of the mortgagor to enable him to give another limited security. The mortgagor then made several mortgages beyond the one contemplated, these mortgagees having no notice of the first mortgage. Held, that the first mortgagee must be postponed to them, and that notice of the first charge ought to have been indorsed on the purchase deed. *Perry Herrick v. Attwood*. 205
2. Effect of assigning a mortgage debt, reserving the securities. *Morley v. Morley*. 253
3. *W. M.*, in 1846, mortgaged some property to the Plaintiffs, for securing a debt of 11,300*l.* In 1857, the Plaintiffs assigned to trustees, for their creditors, this and another debt due from *W. M.*, and all securities for the same (except the mortgage of 1846, and the premises thereby assigned, and the benefit and advantage to arise therefrom). The surplus was to be paid to the Plaintiffs, and there was a proviso, that the Plaintiffs

were to have the property comprised in the mortgage for their own benefit. Held, that as against a subsequent judgment creditor of *W. M.*, the Plaintiffs could maintain a bill to foreclose the mortgage. *Morley v. Morley*.

Page 253

4. Where a first mortgage extends to future advances, further advances made by the first mortgagee, after notice of second mortgage, have no priority over the latter. *Roll v. Hopkinson*. 461
5. Interest was paid on a mortgage of 360*l.* from 1829 to 1852, but the Court, in 1857, decided, that 110*l.* of the 360*l.* was not well charged on the property. Held, in taking the accounts, that the interest, thus paid for twenty-three years on the 110*l.*, ought not to be treated as payments in discharge of the capital of the remaining 250*l.* *Blandy v. Kimber*. (No. 2.) 537
6. The Defendants, who were entitled to the equity of redemption of leaseholds charged with a mortgage, attempted to get rid of it by fraudulently incurring a forfeiture, which they induced the lessor to take advantage of. They afterwards obtained a new lease from him, which they sold. Held, that the new lease was subject to the mortgage, notwithstanding the 15 & 16 *Vict.* c. 76, ss. 210, and a decree was made for payment by the Defendants of the mortgage with costs. *Hughes v. Howard*. 575

See CHAPEL.

CONVEYANCE.

LIS PENDENS, 2.

PLEADING, 1, 2.

PRIORITY.

RAILWAY, 2.

SALE, 1.

SURETY.

TITLE DEEDS.

MORTMAIN.

Bequest of money to a society established for assisting the owners of impropriate tithes, by money payments, to restore them to spiritual purposes, is void under the Statute of Mortmain, and is not rendered valid by the 13 & 14 Vict. c. 94, s. 23. *Denton v. Lord John Manners.* Page 38
See CHARITY.

NEWSPAPER.

See VENDOR AND PURCHASER, 6.

NEXT FRIEND.

See LUNATIC.

NEXT OF KIN.

Bequest to *A.* for life, and afterwards to his children, and in default, "then" unto the persons "of the blood or next of kin of the testator as would, by virtue of the Statute of Distributions, have become and been *then* entitled thereto, in case the testator had died intestate." *A.* died without issue. Held, that the class comprising

the ultimate gift was to be ascertained on the death of the testator, and not of *A.*, and that the class took as tenants in common, notwithstanding the exclusion of the testator's widow. *Downes v. Bullock.* Page 54

ORDER AND DISPOSITION.

See BANKRUPT, 1.

"OR" READ "AND."

Bequest of residuary personal estate in trust for testator's wife for life, and on her death to pay, &c., to his son *C. A.* on his attaining twenty-one. But if he should depart this life before the wife "or" before attaining twenty-one, then in trust for the Defendants. Maintenance to, and a power to advance *C. A.* were also given. *C. A.* attained twenty-one, but died in the wife's lifetime. Held, that "or" was to be read "and," and that the son took an absolute vested interest on attaining twenty-one. *Bentley v. Meech.* 197

PARENT.

See ISSUE, 3.

PARTIES.

1. Trustees of a creditor deed held sufficiently to represent all the creditors in a suit to foreclose. *Morley v. Morley.* 253
2. A surety who covenants for pay-

ment of the mortgage money is not a necessary party to a foreclosure suit, if he has paid nothing.

Gedye v. Matson. Page 310

3. A suit in equity is maintainable by a member of a mutual marine insurance society against the managing committee, to recover, by a contribution among the members, the amount of his loss. Form of the decree in such a case. *Hutchinson v. Wright.* 444

PARTITION.

Upon a partition, the shares of the parties were very minute and complicated. The Court, to save expense, and instead of directing a conveyance of the several shares, declared each of the parties trustees as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee, under the Trustee Acts, with directions to convey to the several parties their allotted shares. *Shepherd v. Churchill.*

21

PARTNER.

1. A person selling a share in his business and becoming a partner with the purchaser, for an indefinite period, would not, in equity, be permitted to dissolve the partnership immediately afterwards, and retain the premium. *Featherstonhaugh v. Turner.* 382
2. A surgeon sold one-fifth of his business and entered into partnership with the purchaser for such

term as they should mutually agree to continue. The articles provided, that in the event of the death of a partner, the survivor might purchase his share and interest in the business, but if he should decline, it should be sold to any other person. The purchaser died at the end of fifteen months, and the surviving partner declined either to purchase or to admit a purchaser into the business. He was charged with the value of the deceased partner's share and interest. *Featherstonhaugh v. Turner.*

Page 382

3. The Court will restrain a purchaser from doing acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property. *Marshall v. Watson.* 501
 4. This Court will not dissolve a partnership on the ground of a small infraction of the articles of co-partnership. *Anderson v. Anderson.* 190
 5. Articles of partnership provided, that if either of the partners should give guarantees without consent, the other might dissolve on giving notice. One of the partners, in the course of eight years, gave a guarantee for 52*l.*, and the other gave notice to dissolve. Held, that this alone was not, in equity, a sufficient ground for a dissolution. *Ibid.*
- See BANKRUPT, 2.
GOOD-WILL.
STATUTE OF LIMITATIONS, 2.

PATENT.

1. As to the jurisdiction of the Court to "expunge, vacate and vary" entries on the "Register of Proprietors" of patents under the 15 & 16 of *Vict. c. 83, s. 38. In re Morey's Patent.* Page 581
2. The Court can, on motion, expunge an entry fraudulently made, and can direct any facts relating to the proprietorship to be inserted on the register; but not the legal inferences to be drawn from them. *Ibid.*
3. A patentee assigned half the patent to *A.*, and afterwards he assigned the whole to *B.*, by a deed, reciting that he had already granted a licence to work and use to *A.* *B.*'s assignment was first registered. Held, that *B.* had constructive notice of *A.*'s rights, and an entry was ordered, on motion, to be made in the register, that the licence referred to in *B.*'s assignment was the deed of assignment to *A.* subsequently entered. *Ibid.*

PATRONAGE.

A testator bequeathed 1,500*l.* towards adding to the endowment of a church. By a codicil, he declared, that in consideration of it, his nephew and his heirs should have every third nomination of the clergyman. The bishop (who was the patron) refused to relinquish the patronage. Held, that the gift failed, and that the 1,500*l.* fell into the residue. *In re Welstead.*

612

See SCHOOL-MASTER.

PAYMENT.

A testator gave all his personal estate to his wife for life, and he bequeathed 40*l.* to *A. B.*, and other pecuniary legacies, all of which were payable at her death. By a first codicil, he gave a legacy of 200*l.* to *C. D.* (who was not mentioned in his will), and he directed that all things in his codicil should be performed as if the same were so declared in his will. By another codicil, he revoked the legacy of 40*l.* to *A. B.* and gave her 50*l.* Held, that the legacy of 200*l.* was payable at the death of the testator, but that the payment of the legacy of 50*l.* was postponed until the death of the widow. *Giesler v. Jones.* Page 418

PAYMENT OUT OF COURT.

A fund in Court belonged in reversion to a married woman. After her death, the husband, in 1821, sold and assigned it. The tenant for life died, and it having been found impossible to obtain from him an affidavit of no settlement, the Court, in 1858, ordered payment to the assignee without one, on proof of there having been no children. *Clarke v. Woodward.* 455
See APPOINTMENT, 3.

PERPETUITY.

See REMOTENESS.

PLEADING.

1. A bill by assignees of a bankrupt prayed to set aside a mortgage

executed to a creditor by a bankrupt on the eve of bankruptcy, as being "in fraud of his general body of creditors," and it also prayed general relief. The bill failing on the ground of fraud, held that the Plaintiffs were not entitled to a decree for redemption. *Johnson v. Fesenmeyer.* Page 88

2. An estate, on which there were two equitable mortgages, was ordered to be sold, and the produce divided according to their priorities, which, however, were not declared by the decree. Afterwards, the second mortgagee instituted a second suit, claiming priority over the first, upon a title paramount to that of the mortgagor, which was discovered in the first suit. Held, that a bill of revivor was unnecessary, and relief was given in the second suit. *Langstaff v. Nicholson.* 160
 3. A pleading is to be taken most strongly against the pleader, and where a bill contains general and specific allegations as to the same matter, the general allegation must be referred to the particular and specific one. *Ellis v. Colman, Bates and Husler* 662
- See CO-DEFENDANTS.

LUNATIC.

PARTIES.

POLICY.

1. By a policy "the stocks, funds and property" of the company were alone liable. Held, that the representatives of the insured were entitled to sue in equity to make

his rights available, notwithstanding the company was being wound up. *Robson v. McCreight.*

Page 272

2. Life policy obtained for fraudulent purposes declared void, and the premium already paid to the insurance office applied in payment of the costs. *The Prince of Wales Assurance Company v. Palmer.* 605
 3. A life policy was to become void, if the assured should "commit suicide." After assigning it, he hung himself, while of unsound mind. Held, that the policy was not avoided as against the assignee. *Defaur v. The Professional Life Assurance Company.* 599
 4. A policy was to become void in certain cases, except it "should have been legally assigned." Held, that this meant "validly and effectually assigned:—that an equitable charge, by mere deposit, came within the exception, and that notice of it to the office was unnecessary. *Ibid.*
- See SHIP.

PORTIONS.

See ELDEST SON.

YOUNGER CHILD.

POWER.

1. Observations on the decision in *Tucker v. Sanger, McClel.* 424. *Birley v. Birley.* 299
2. An absolute appointment was made to an object of a power, under a prior "understanding" between the appointor and appointee, to hold

- in "trust" for persons, some of whom were objects and some not. Held, that the whole was void. *Birley v. Birley*. Page 299
3. A parent had a power to appoint to children alone. She appointed to two children absolutely. The next year, the appointees settled the property on children and grandchildren of the parent, by a deed reciting, that when the appointment was made, it was understood, between the appointor and appointees, that the latter should consider themselves as possessed of the property upon the trusts of the settlement. Held, that the transaction was a fraud on the power and wholly void. *Ibid*.
4. A testamentary instrument, signed but invalid for want of attestation, is not a good execution of a power to appoint by writing signed or by will. *Re Daly's Settlement*. 456
5. Gift to wife for life, "to be disposed of, at her death, amongst my children as she shall think proper." Held, to confer a power to appoint, by will, amongst his children living at her death, and an implied gift in default of appointment. *Reid v. Reid*. 469
6. Appointment to one of several objects of a power, in payment of a debt due to her from the appointor, held void. *Ibid*.
7. A testator directed his trustees to divide his property "among his first cousins, as they might, in their uncontrolled discretion, think proper, by dividing the whole equally among them or between two or more of them, or giving the whole to any one of them, and for such estate or estates, interest or interests, and with, under and subject to such powers, discretions and limitations as they might think proper, so that the same were in favor of some one or more of his first cousins or their descendants." Held, that the trustees could not appoint to the cousins in unequal shares. *Ward v. Tyrrell*. Page 563
8. A testator gave his wife a power of appointment in favor of "his children, including grandchildren and more remote issue, such issue coming into being in the lifetime of his wife." Held, that, under an appointment to grandchildren, a grandchild born after the decease of the testator's widow might take. *Thomas v. Lloyd*. 620
- See* ABSOLUTE INTEREST, 2.
ACCELERATION.
APPOINTMENT.
LIS PENDENS, 3.
REVOCATION, 1, 2.
- POWER OF SALE.
See REMOTENESS, 2.
- PRACTICE.
See ABANDONED MOTION.
APPOINTMENT.
CO-DEFENDANT.
COSTS.
EVIDENCE.
INJUNCTION.
PAYMENT OUT OF COURT.
PRODUCTION.
PRO CONFESSO.

See RECEIVER.

TAXATION, 1, 2.

TRAVERSING ORDER.

PRESUMPTION.

Presumption of legitimacy, under the circumstances, of a person named in a will of 1776 as the testator's son. *Attorney-General v. Boucherett.* Page 116

PRIORITY.

1. Where a contest existed between equitable mortgagees as to priority, and a question arose whether the one who had the title deeds would be bound to give them up, the difficulty was removed by ordering a sale, and all parties to concur therein, reserving the rights of the parties as against the purchase-money. *Langstaff v. Nicholson.* 160
2. In 1829, *H. de C.* secured an annuity on trust funds, and in 1841, he, for valuable consideration, assigned his interest in the same funds in trust to raise 1,100*l.*, and redeem the annuity, and hold the residue on trusts for his family. The trustees accordingly raised the 1,100*l.* by mortgage and redeemed the annuity, and the trust funds were assigned to the mortgagee, but no transfer was made of the annuity. The mortgage deed stated, the consideration to have been "for the repurchase and extinction of the annuity." The annuity had originally priority over certain claimants, but the

deed of 1841 had not. Held, that to the extent of the monies paid for the repurchase of the annuity, the mortgagees had priority over those claimants. *Irby v. Irby.* Page 632

See FURTHER ADVANCES.

LIS PENDENS, 2.

MARSHALLING.

MORTGAGE, 1, 6.

TITLE DEEDS.

PRIVILEGE.

A solicitor, in the presence of his client, objected to produce a document, on the ground of professional confidence. The Court being of opinion that the document was not privileged as regarded the client himself, ordered its production. *In re The Cameron's Coalbrook, &c. Railway Company.* 1

PRO CONFESSO.

A Plaintiff advertized that he would move to take the bill *pro confesso* at the end of six weeks. The notice was advertized once in every one of the first four weeks, but not in the two last. Held, that this was a sufficient compliance with the exigency of the 79th General Order of May, 1845. *Millar v. Elwin.* 674

PRODUCTION.

Distinction between the production of documents at the instance of the party who created the lien, and of a stranger, and between



production and parting with the possession. *In re The Cameron's Coalbrook, &c. Railway Company.*

Page 1

PUBLIC COMPANY.

See CONTRIBUTORY.

DIRECTOR.

ESTOPPEL.

MAKING GOOD REPRESENTATION.

MISREPRESENTATION.

RAILWAY.

RAILWAY.

1. The 8 & 9 Vict. c. 42 (1845) enabled canal companies to become carriers on canals, to lease their canals and to take leases of others. Subsequently (1856), a railway company obtained an act, enabling them to purchase the X. canal and to exercise all its "rights, powers and privileges." Held, that after the purchase, the railway company had authority to take a lease of canal Y., under the first act, this being a "right, power and privilege" possessed by canal X., and which passed, on its sale, to the railway company. A motion by a shareholder of the railway for an injunction to restrain the purchase of canal Y. was refused. *Rogers v. The Oxford, Worcester and Wolverhampton Railway Company.* 322
2. A judgment creditor and debenture holder of a railway company held neither entitled to a foreclosure or sale. But inquiries

were directed. *Furness v. The Caterham Railway Company.*

Page 614

See CONTRIBUTORY.

DIRECTOR.

MAKING GOOD REPRESENTATION.

MISREPRESENTATION.

REAL AND PERSONAL ESTATE.

See COSTS, 2.

MIXED FUND.

RECEIVER.

Ex parte motion, before appearance, for a receiver refused. *Caillard v. Caillard.* 512

See STATUTE OF LIMITATIONS.

RECOUPING.

Tenant for life received 5*l.* per cent. on a mortgage improperly taken by trustees, and for which, on a loss, they were made responsible. Held, that he was only entitled to 4*l.* per cent. in taking the account of income, and that the remaining 1*l.* per cent. must be taken as part of the subsequent income. *Griffith v. Porter.* 236

See BREACH OF TRUST, 2.

MARSHALLING.

REFUNDING.

SET-OFF, 3.

REDEMPTION.

See MORTGAGE.

PLEADING, 1, 2.

REFORMING DEED.

1. In a suit to rectify a settlement, there being no blame imputable

to any of the parties, the costs are payable out of the fund. *Stock v. Vining*. Page 235

2. Mode of rectifying a settlement by striking out the erroneous words and indorsing the decree. *Ibid*.

REFUNDING.

Legatees held not liable to refund, at the suit of other legatees, payments voluntarily made to them by the executors, under a mistake, but held liable to recoup out of the undistributed funds in which they were interested. *Downes v. Bullock*. 54
See SET-OFF.

RELEASE.

Trustees, on receipt from other trustees of trust moneys, are not bound to execute a release, all that can be required from them is a written acknowledgment of the receipt of the money. *In re Cater's Trusts*. (No. 2.) 366

REMOTENESS.

1. A testator devised his estates to trustees, in trust, after *A. C.*'s decease, "in case she should have only one child which should survive her," to pay 200*l.* a year for his maintenance until he should attain twenty-five; and from and after such only child should attain that age, to raise 10,000*l.*, and pay the same to him at that age. Or in case *A. C.* should, "at her decease, have two or more children," then to raise an annuity for their maintenance "until they should respectively attain twenty-five,

and when they respectively attained that age, to pay each an equal share of the 10,000*l.*" The plaintiff was *en ventre sa mère* at the testator's death, and was the only child of *A. C.* who survived her. Held, that the bequest of the 10,000*l.* was too remote. *Merlin v. Blagrove*. Page 125

2. Trusts for sale on failure of a series of prior limitations: held, on the context, to be too remote. *Hale v. Pew*. 335
See ALTERNATIVE GIFT.

RENT-CHARGE.

Bequest of an annuity or rent-charge to *A.* for life, and after her decease unto her children equally, to be applied in their maintenance until the youngest attained twenty-one, and then to be sold and the produce divided amongst them. Real estates were then devised to *B.* charged with the annuity. Held, that the rent-charge was perpetual and not for life. *Mansergh v. Campbell*. 544

REPRESENTATIVE.

A person cannot be appointed to represent an estate under the 15 & 16 *Vict. c. 86, s. 44*, without his consent. *The Prince of Wales, &c. Association Company v. Palmer*. 605

RESCINDING CONTRACT.

See CONDITIONS OF SALE, 2.

RESIDUE.

N. devised an estate to *R.* to such of the children of *J.* as *J.* should by

will appoint, and in default to them equally. By the death of four of *J.*'s children, *J.* took half the estate as heir of his deceased children. *J.*, by his will, devised all his real estate to his children equally, and he directed that the estate at *R.*, devised by the will of *N.*, over which he might have any power of appointment by will, should not be included or affected by his own will, but should go according to the limitation contained in *N.*'s will. Held, that *J.*'s moiety in the *R.* estate passed under the residuary devise in his will, and did not descend to his heir. *Atherton v. Langford.*

Page 5

REVOCATION.

1. Property was settled by *A.* with power for him to revoke the settlement by deed. *A.* by a deed, which did not profess to execute the power, conveyed the property to his nephews beneficially. Held, that the deed operated as a revocation. *Cowlshaw v. Hardy.* 169
2. *A.* settled mortgages on himself for life, with remainder to *B.*, with a power of revocation by deed. *A.* transferred the mortgages to his nephew *C.* by deed, expressed to be made in consideration of the mortgage money. *C.* never paid the consideration, but alleged that *A.* intended a gift to him. Held, that there was no revocation, and that either the mortgage or the consideration money was subject to the settlement. *Ibid.*

SALE.

See PRIORITY, 1.

SATISFACTION.

The testator, on his marriage, covenanted that his representatives should, within three months after his decease, pay 2,000*l.* to trustees, to be held for his wife for life. By his will, after directing all his debts to be paid, he gave his widow an annuity of 200*l.* a year, payable quarterly, and other benefits. Held, that the provision for the wife under the settlement was not satisfied by the provision made for her by the will. *Code v. Willard.* Page 568

SCHEME.

See CHARITY, 1, 4.

SCHOOL.

1. The governing body of a grammar school founded by *Edward IV.*, was empowered, with the advice of the Bishop of the diocese, to make statutes and ordinances. *In re The Stafford Charities.* 28
2. Held, that this was a Church of *England* school, and that the trustees must be of that persuasion; but the Court on directing a scheme refused to give any special directions as to religious instruction, further than that it was to be in accordance with the statutes and ordinances made, from time to time, by the trustees and the Bishop. *Ibid.*
3. *The Attorney-General v. The Sher-*

borne Grammar School (18 *Beav.* 256) followed. *In re The Stafford Charities.* Page 28

SCHOOL-MASTER.

A testator bequeathed a sum to Sir *E. A.* upon trust to lay it out in lands, for the endowment of a school. And he appointed that Sir *E.* and his heirs "should be feoffees in trust and patrons and protectors of the said school for the electing a fit and sufficient school-master." Held, that the right of patronage was alienable. *The Attorney-General v. Bouche-rell.* 116

SEPARATE ESTATE.

See DOMICIL, 1.

FEME COVERT.

HUSBAND AND WIFE.

SET-OFF.

1. Two sons had, as against their father, a lien on his estate, for an outlay made thereon by them; on the other hand, the father had a claim against the sons in respect of a suretyship entered into by him for them. Held, that these demands might be set off in equity. *The Unity Joint Stock Mutual Banking Association v. King.* 72
2. In a suit by the next of kin of *John*, against the representatives of *James*, voluntary payments which had been made by the representatives of *James*, out of his estate, under verbal directions given by him, were held not to be a satis-

faction, *pro tanto*, of the Plaintiff's right to *John's* residuary estate, or to be capable of being set off against the Plaintiff's demands. *Comleshaw v. Hardy.*

Page 169

3. *A. B.* was entitled to a share of funds held upon the trusts of his father's marriage settlement, and for which his father's estate was liable. He was one of his father's executors. In a suit to administer the trusts of the settlement and his father's estate, a large balance was found due from *A. B.* as executor. Held, that the trustees of the settlement were entitled to retain such balance out of *A. B.'s* share, and that purchasers from *A. B.*, pending the suit, with notice of the proceedings, were bound by the same equity. *Irby v. Irby.*

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See BEQUEST.

TRUSTEE, 1, 2.

SETTLEMENT.

See COVENANT TO SETTLE.

PAYMENT OUT OF COURT.

SHERIFF.

1. The present liability, in equity, of the sheriff for an escape is the loss actually sustained, and this Court will ascertain the amount of damages. *Moore v. Moore. In re Mozley.* 8
2. The principle on which the amount is to be ascertained is, by charging the sheriff with the whole debt, and throwing on him the *onus* of proving that less would have been

recovered if the prisoner had remained in custody or given bail.

Moore v. Moore. Page 8

3. A person was taken upon an attachment for nonpayment of money. The sheriff, without taking bail, allowed him to go at large, on his promise to surrender. The sheriff's officer, having called on him to surrender, he shot himself before a recapture, but the officer retained his body. Held, that the sheriff was liable as for his escape. *Ibid.*

SHIP.

1. *A. B.*, having insured his ship, afterwards transferred it, but without the policy, to *C. D.* The transfer on the register, though absolute in form, was, in fact, by way of mortgage. The ship having foundered, held, that *A. B.*, being liable for the mortgage debt, had a sufficient interest in the ship to entitle him to recover the whole loss. Held also, that the policy of the Navigation Laws (17 & 18 Vict. c. 104) did not apply to such a case. *Hutchinson v. Wright.* 444
2. One of the rules of a mutual marine assurance society provided, that "no vessel which is mortgaged shall be insured, unless the mortgagee give a written guarantee, to the satisfaction of the committee, for payment of all demands on the said vessel." Held, that this applied only to a ship mortgaged at the time of effecting the insurance, and that it did not render a gua-

rantee necessary when a ship was mortgaged after being insured. *Hutchinson v. Wright.* Page 444
See PARTIES, 3.

SOLICITOR AND CLIENT.

See PRIVILEGE.

TAXATION.

SPECIFIC LEGACY.

In *June*, a testator directed his bankers to purchase 1127 francs French Rentes for him. They entered the purchase in their books, but never transferred the amount into the testator's name; they had, however, sufficient Rentes to answer it, which they considered they held for the testator. In *July* following, the testator bequeathed "the annual rente of 1127 francs, inscribed in his name in the book of the public debt of France," to *A. B.* Held, that *A. B.* was entitled to 1127 Rentes, although the testator had none in his name, and although, on the balance of previous transactions in Rentes with his banker, he was entitled only to 708 francs in Rentes. *Ellis v. Eden.* (No. 2.) 482

SPECIFIC PERFORMANCE.

1. A person contracting for the lease of a mine cannot resist its performance on the ground of his ignorance of mining matters, and of the mine turning out worthless. *Haywood v. Cope.* 140
2. Specific performance is a matter of discretion, to be exercised,

however, according to fixed and settled rules, and the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance. *Haywood v. Cope.*

Page 140

3. *A.* agreed to grant a lease to *B.* as soon as *B.* should have built a house, with the necessary out-buildings on the land, of the value of 1,400*l.* at the least, "according to a plan to be submitted to and approved by *A.*" *B.* agreed to build and take the lease. No plan had been approved of. Held, that no decree could be made for specific performance, and a bill filed by *A.* for that purpose was dismissed with costs. *Brace v. Wehnert.* 348

4. Directors having entered into a contract, *ultra vires*, and which was not binding on the Company: Held, that it could be neither specifically performed, nor could the Court order them to make good their representations. *Ellis v. Colman, Bates and Husler.* 662
See CONDITIONS OF SALE.

VENDOR AND PURCHASER, 1, 2.

STANDING BY.

See LIEN.

STATUTE OF LIMITATION.

1. Payments made by a receiver in a suit, but which were not authorized by the order appointing him, held not to take the case out of the Statute of Limitations. *Whitley v. Lowe.* 421
2. In a suit by the executors of two

deceased partners against the third, who survived, to take the accounts of the concern, a receiver was appointed, and ordered to pay the proceeds of the assets into Court. Instead of this, he paid them over to one of the Plaintiffs, in part discharge of the debt due to their testator from the estate of the other deceased partner, upon the balance of the accounts as then estimated. Held, that such payment did not take such debt out of the Statute of Limitations. *Whitley v. Lowe.* Page 421

STATUTES.

- 4 & 5 *Vict.* c. 35.
See COPYHOLD.
- 6 & 7 *Vict.* c. 73.
See TAXATION.
- 8 & 9 *Vict.* c. 42.
See RAILWAY.
- 10 & 11 *Vict.* c. 96.
See CHARITY, 4.
- 13 & 14 *Vict.* c. 60.
See TRUSTEE ACT.
- 13 & 14 *Vict.* c. 94.
See MORTMAIN.
- 15 & 16 *Vict.* c. 51.
See COPYHOLD.
- 15 & 16 *Vict.* c. 76, s. 210.
See MORTGAGE, 6.
- 15 & 16 *Vict.* c. 83, s. 38.
See PATENT, 1, 2.
- 15 & 16 *Vict.* c. 86, s. 44.
See REPRESENTATIVE.
- 15 & 16 *Vict.* c. 86, s. 58.
See INJUNCTION.
- 17 & 18 *Vict.* c. 104.
See SHIP.

18 & 19 *Vict.* c. 15, s. 11.

See CONVEYANCE.

19 & 20 *Vict.* c. 120.

See LEASES AND SALES ACT.

SUBSTITUTED SERVICE.

See TRAVERSING ORDER.

SUBSTITUTIONAL GIFT.

Bequest to *A.* for life, with remainder to her children living at her death, and their issue, the issue to take the share of a deceased parent, followed by a declaration that the children should take vested and transferable interests at twenty-one, or leaving lawful issue at the time of his decease before that age. A child attained twenty-one, and died in the life of *A.* without having any issue. Held, that their representatives took no share. *In re Payne.* Page 556

SURETY.

A surety for a mortgagor, who pays part of the mortgage, is entitled, as against the mortgagor, to a charge on the estate. *Gedye v. Matson.* 310

See PARTIES, 2.

SET-OFF, 1.

SURGEON.

See PARTNER, 2.

SURVIVORSHIP.

1. Survivorship as to a class, in a gift after the death of the tenant for life, referred to the death of the

testator and not to the death of the tenant for life. *Evans v. Evans.*

Page 81

2. Gift to *A.* for life, and after her decease, to "the surviving children of *B.* and *C.*, except the youngest son of *B.*, who was to have 30*l.* to his share more than the others. The will proceeded, "should either of the said children die having no issue, his or her share to be then equally divided amongst the survivors." Held, that the children of *B.* and *C.* took vested interests at the death of the testator, in remainder expectant on the decease of *A.*, with a gift to the survivors in the event of any one dying without issue in that interval. *Ibid.*

3. On a gift, after a tenancy for life, to a class equally, with benefit of survivorship, upon their severally attaining twenty-one, the survivorship was held to refer to the attaining twenty-one, and the representatives of one who attained twenty-one, but died in the lifetime of the tenant for life, were held entitled to a share. *Knight v. Knight.* 111

4. Gift to *A.* for life, and afterwards to seven named persons, equally, "the share of each who shall happen to die to be equally divided amongst the survivors, unless *A. M. P.* [one of them] should die leaving children, in that case, I mean that her children should inherit the share of the parent." The seven all died before the tenant for life, *A. M. P.* being the sur-

vivor of them. Held, first, that the seven took equally, secondly, that the children of *A. M. P.* took no more than one-seventh, and thirdly, that the share of one of the seven who predeceased the testatrix was undisposed of. *Cambridge v. Rous.* Page 409

TAXATION.

1. An order was made for taxation, nominally on the petition and undertaking of *A. B.* and others. The certificate was made ten years after, and an order was then made on *A. B.* to pay. *A. B.* applied to discharge the order for payment, shewing that the order had been obtained without his authority and during his absence from *England*. Held, that while the order for taxation stood, the order for payment was regular; but what his remedy might be, *quære*. *Re Thompson and Debenham.* 245
2. The charges of solicitors employed as electioneering agents held taxable under the statute. *In re Osborne.* 353
3. The proper mode of enforcing the delivery of a solicitor's bill is, to serve the order with a proper indorsement under the 12th Amended Order of the 11th of *April*, 1842, and upon default being made, an attachment will go as of course. *Ex parte Bellon.* 368
4. Alteration made in the form of the taxing order. *Ibid.*

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5. Assignees in insolvency of solicitors ordered to pay the costs of taxation, when more than one-sixth having been taxed off a bill of costs delivered by them. *Shea v. Boschetti, In re Peile.* Page 561

TENANT FOR LIFE.

See ABSOLUTE INTEREST.

RECOURING.

TITLE.

Taking possession of a mine by intended lessee held not to be an acceptance of the title. *Haywood v. Cope.* 140

TITLE DEEDS.

Mortgagee by demise postponed for allowing the mortgagor to retain the title deeds. *Perry Herrick v. Attwood.* 205

TRAVERSING ORDER.

Order for substituted service of a traversing note made, without proof that the Defendant was within the jurisdiction. *Hunt v. Niblett.* 124

TRUSTEE.

The personal interests of a trustee in a trust fund in Court will be made applicable to the discharge of all claims against him as trustee. *Irby v. Irby. (No. 3.)* 632

See BREACH OF TRUST.

CHARITY, 2, 3.

DIRECTOR, 1.

RELEASE.

TRUSTEE ACT.

TRUSTEE RELIEF ACT, 1, 2.

TRUSTEE ACT.

1. The 22nd section of "The Trustee Act, 1850," applies to future as well as past dividends. *Re Peyton's Settlement*. Page 317
2. Bank Stock was standing in the names of four trustees, one of whom was abroad and unaccessible. There being some inconvenience in removing him, the Court, under the Trustee Act, vested the right to receive the past and future dividends in the three other trustees during their joint lives. *Ibid*.
3. The sole trustee of money for A. and B. invested it in stock, in the joint names of himself and B. (an infant). After the deaths of the trustee and A., the infant was held to be a trustee within the Trustee Acts, and a vesting order was made. *Sanders v. Homer*. 467
See PARTITION.

TRUSTEE RELIEF ACT.

1. A trustee vexatiously paying trust money into Court under the Trustee Relief Act ordered to pay the costs of the Petitioner for obtaining payment. *In re Cater's Trust*. (No. 1.) 361
2. A trustee paid trust funds into Court, under the Trustee Relief Act, merely because other trustees to whom it was payable declined to give a release. He was ordered to pay the costs of getting the money out of Court. *In re Cater's Trust*. (No. 2.) 366
See CHARITY.

UNCERTAINTY.

A testator after gifts to "his sister M. F. T. D." and to his niece "A. T. D." (but who were really the sister and niece of his wife), gave a portion of his residue to "his niece M. F. T. D." He had no niece of that name. The Court, being unable to come to a conclusion whether the word "niece" had been by mistake substituted for "sister" or the name M. F. T. D. for A. T. D.: Held, that the gift of the residue was void for uncertainty. *Drake v. Drake*. (No. 2.)

Page 642

VENDOR AND PURCHASER.

1. The Plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards, the Defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The colliery turned out to be worthless. Held, that the Defendant could not resist a specific performance, on the ground of the Plaintiff not having communicated the fact of his having worked the mine and found it unprofitable. Held also, that taking possession of the mine by the intended lessee was not an acceptance of the title. *Haywood v. Cope*. 140
2. The Defendant agreed to purchase a property at a valuation to be made by A. B. The Court, though it considered A. B.'s valuation very

high, "and perhaps exorbitant," decreed specific performance, there appearing neither "fraud, mistake or miscarriage." *Collier v. Mason.*

Page 200

3. A vendor has duties, in that character, which he cannot get rid of by such conditions of sale. *Greaves v. Wilson.* 290

4. The agent of vendors, who had authority to receive the purchase-money, had in his hands a sum belonging to the purchaser sufficient for that purpose and was directed by him to apply it in payment. The agent accordingly debited the purchaser's account and credited the vendors' account with the amount, and he rendered to the vendors an account, charging himself with that sum as received from the purchaser. Held, that this was not a valid payment to the vendors, and that they had still a lien on the estate for a part of the money lost by the bankruptcy of the agent. *Wrouth v. Dawes.* 369

5. The vendors had executed the conveyance and signed a receipt, which remained in the hands of the common agent of vendors and purchaser, and the purchaser had been admitted to the copyhold estate and obtained possession. Held, that this did not vary the case. *Ibid.*

6. Proprietors of a newspaper dissolved partnership, and one of them agreed to purchase the whole. Before the completion and pending a suit for specific performance,

the purchaser published statements as to the profits and loss of the paper, in order to establish a company to carry it on. A motion for an injunction to restrain him was refused. *Marshall v. Watson.* Page 501

7. The Court will restrain a purchaser from doing acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property. *Ibid.*

See CONDITIONS OF SALE.

CONTRACT.

CONVEYANCE.

COPYHOLD.

SPECIFIC PERFORMANCE.

TITLE.

VERDICT.

See ESTOPPEL.

VESTED INTEREST.

1. A testator bequeathed his residue to his wife for life, and at her decease "to be equally divided between his two daughters, B. and C.," and in case of marriage to be settled on themselves. The tenant for life was still living, and B. had never been married. Held, that B. took an absolute vested interest on the death of the testator. *Smith v. Colman.* 216
2. Distinction in regard to vesting, between a direction to "divide amongst a class at once," and such a direction after a tenancy for life. *Adams v. Roberts.* 658
3. Under a trust for A. for life, "and after her decease, to be di-

vided equally between her younger children." Held, that the children took vested interests at their births. *Adams v. Roberts.*

Page 658

WILL.

In construing a will, plain and distinct words are only to be controlled by words equally plain and distinct. *Goodwin v. Finlayson.*

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See ABSOLUTE INTEREST.

ACCELERATION.

ACCRUER.

ADDITIONAL LEGACY, 1, 2.

ALTERNATIVE GIFT.

ANNUITY.

APPOINTMENT.

BEQUEST.

CLASS.

CONTINGENT ESTATE, 1, 2.

CROSS REMAINDER.

CY-PRES.

DEVISE.

DOMICIL, 3.

ELDEST SON.

ELECTION.

ESTATE PUR AUTRE VIE.

ESTATE TAIL.

FORFEITURE.

HEIRS.

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LEGATEE.

LONG ANNUITIES.

MAINTENANCE.

MARRIAGE WITH CONSENT.

MARSHALLING.

MIXED FUND.

See MORTMAIN.

NEXT OF KIN.

"OR" READ "AND."

PATRONAGE.

PAYMENT.

POWER.

REMOTENESS.

RENT-CHARGE.

RESIDUE.

SATISFACTION.

SPECIFIC LEGACY.

SUBSTITUTIONAL GIFT.

SURVIVORSHIP.

UNCERTAINTY.

VESTED INTEREST.

YOUNGER CHILD, 3.

WILLS ACT.

See ESTATE PUR AUTRE VIE.

WINDING UP.

See ESTOPPEL.

CONTRIBUTORY.

POLICY, 1.

WITNESS.

A witness is bound to produce a document, in order that it may be given in evidence, notwithstanding he may have a lien on it. *In re The Cameron's Coalbrook, &c., Railway Company.* Page 1

See PRIVILEGE.

PRODUCTION.

YOUNGER CHILD.

1. *A. B.*, on his marriage, settled real estates on himself for life, then to trustees for a term to raise portions for his younger children, and sub-

ject thereto, to his first and other sons in tail. The portions were to vest in sons at twenty-one, but to be payable after the decease of the husband and wife. *George*, the second son, attained twenty-one, after which *William*, the eldest son, having barred the entail, died without issue, and, subsequently, the portions became payable. Held, that *George*, though the eldest at the period of distribution, was entitled to a share of portions for younger children. *Adams v. Beck*.

Page 648

2. The character of "eldest son" is, in ordinary cases, to be ascertained at the period of vesting, and not of payment. *Adams v. Adams*. 652

3. Bequest to *A.* for life, and after-

wards in trust for her children who, not being an eldest or only son, should attain twenty-one. In 1854, after *George*, the second son, had attained twenty-one, the eldest son died, and the second thereupon became eldest. The tenant for life died in 1857. Held, that *George*, though an eldest son at the time the fund became payable to the children, took a share. *Adams v. Adams*. Page 652

4. Under a trust for *A.* for life, "and after her decease, to be divided equally between her younger children:" Held, that the character of "younger child" was to be determined at the period of vesting, and not at that of distribution. *Adams v. Roberts*. 658

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